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Supreme Court, U.S.
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No. ____

IN THE
Supreme Court of the United States

POWEREX CORP., A CANADIAN CORPORATION,
DBA POWEREX ENERGY CORP.,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA
EX REL. BILL LOCKYER,
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 4, 2005

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QUESTIONS PRESENTED

1. Whether an entity that is wholly and beneficially owned by a foreign state's instrumentality, that engages in energy trade on behalf of the foreign state, and that performs international treaty and trade agreement obligations for the benefit of the foreign state, may nonetheless be denied status as an "organ of a foreign state" under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1603(b)(2), based on an analysis of sovereignty that ignores the circumstances surrounding the entity's creation, conduct, and operations on behalf of its government.

2. Whether an entity is an "agency or instrumentality of a foreign state" under the FSIA, 28 U.S.C. § 1603(b)(2), when its shares are completely owned by a governmental corporation that, by statute, performs all of its acts as the agent of the foreign sovereign.

PARTIES TO THE PROCEEDINGS

Petitioner Powerex Corp., a Canadian corporation, dba Powerex Energy Corp. was the defendant/appellant in the district court and court of appeals proceedings.

Respondent People of the State of California ex rel. Bill Lockyer, Attorney General of the State of California, was the plaintiff/appellee in the district court and court of appeals proceedings.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Powerex Corp. states the following:

Powerex Corp. is a Canadian corporation incorporated under British Columbia's Company Act. Powerex is wholly owned by the British Columbia Hydro and Power Authority, which is a Provincial Crown Corporation owned in its entirety by Her Majesty the Queen in right of the Province of British Columbia. No publicly held company owns any Powerex stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vii

INTRODUCTION 1

OPINIONS BELOW 3

JURISDICTION 3

TREATY & STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 12

I. THE NINTH CIRCUIT CREATED A MULTI-CIRCUIT CONFLICT ON WHAT CONSTITUTES AN FSIA "ORGAN" OF A FOREIGN STATE 14

A. The Ninth Circuit's New Standard Eliminates The Fact-Specific Analysis Congress Imposed 14

B. The Ninth Circuit's Decisions Conflict With Three Circuits On Whether A Commercial Entity Performing Government Functions Is An Organ Of A Foreign State 19

C. Uniform Application Of The FSIA's Protections Is Critically Important To Foreign Governments Conducting Business In The U.S. 25

D. The Ninth Circuit's Decisions Create Significant Tensions With The U.S.'s Duties Under The North American Free Trade Agreement 26

II. THE NINTH CIRCUIT'S "OWNERSHIP" HOLDING CONFLICTS WITH *DOLE FOOD* 28

CONCLUSION 30

APPENDIX (separately bound)

TABLE OF AUTHORITIES

Page

CASES

United States

Bolden v. Southeastern Pennsylvania Transp. Auth., 953 F.2d 807 (3d Cir. 1991) 18

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) 23

California v. NRG Energy Inc.:

Order, Nos. 02-57200 *et al.* (9th Cir. Feb. 20, 2003) 11

391 F.3d 1011 (9th Cir. 2004), *petition for cert. pending*, No. 05-85 (docketed July 18, 2005) ..... *passim*

Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect, 89 F.3d 650 (9th Cir. 1996) 18, 21, 23, 28

Davis v. McCourt, 226 F.3d 506 (6th Cir. 2000) 20, 26

Dole Food Co. v. Patrickson, 538 U.S. 468 (2003) ..... *passim*

EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd., 322 F.3d 635 (9th Cir.), *cert. denied*, 540 U.S. 1003 (2003) 17, 18, 25

EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Co., 257 F.3d 992 (9th Cir. 2001) 17

Filiz[illegible]nvit Bank:

247 F. Supp. 2d 425 (S.D.N.Y. 2003), *vacated in part*, Nos. 01 Civ. 9510 *et al.*, 2003 WL 21729978 (S.D.N.Y. July 25, 2003), *aff'd*, 378 F.3d 213 (2d Cir.), *cert. denied*, 125 S. Ct. 677 (2004) 20

378 F.3d 213 (2d Cir.), *cert. denied*, 125 S. Ct. 677 (2004) 20

First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983) 1

Focus Media Inc., In re, 387 F.3d 1077 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 1674 (2005) 29

Gates v. Victor Fine Foods, 54 F.3d 1457 (9th Cir. 1995) 15, 16, 17, 21

Gorenc v. Salt River Project Agric. Improvement & Power Dist., 869 F.2d 503 (9th Cir. 1989) 19

Kelly v. Syria Shell Petroleum Dev. B.V., 213 F.3d 841 (5th Cir. 2000) 20, 21, 22, 24

Mutual Life Ins. Co. v. Mooreman, 366 F.2d 686 (9th Cir. 1966) 29

Patrickson v. Dole Food Co., 251 F.3d 795 (9th Cir. 2001), *aff'd in part*, 538 U.S. 468 (2003) 21

RSM Prod. Corp. v. Petroleos de Venezuela Societa Anonima, 338 F. Supp. 2d 1208 (D. Colo. 2004) 20

Shirobokova v. CSA Czech Airlines, Inc., 335 F. Supp. 2d 989 (D. Minn. 2004) 20

Supra Med. Corp. v. McGonigle, 955 F. Supp. 374 (E.D. Pa. 1997) 20

Terrorist Attacks on September 11, 2001, In re, 349 F. Supp. 2d 765 (S.D.N.Y. 2005) 20

Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995) 12

United States v. Rodriguez-Lara, 421 F.3d 932 (9th Cir. 2005) 12

United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co., No. 97 Civ. 6124, 1999 WL 307666 (S.D.N.Y. May 17, 1999), *aff'd*, 199 F.3d 94 (2d Cir. 1999) 20

USX Corp. v. Adriatic Ins. Co., 345 F.3d 190 (3d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004) 13, 18, 20, 21, 22, 23, 24

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 4

British Columbia

Westbank First Nation v. British Columbia Hydro & Power Auth., [1997] 154 D.L.R. (4th) 93, *aff'd*, [1999] 4 C.N.L.R. 277 29

TREATIES

North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, done Dec. 17, 1992, 32 I.L.M. 289 ..... 27, 28

Treaty Between Canada and the United States of America Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D'Oreille River, Apr. 2, 1984, T.I.A.S. No. 11088, 1469 U.N.T.S. 309 8

Treaty Between the United States of America and Canada Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, 15 U.S.T. 1555 5

STATUTES

United States

Foreign Sovereign Immunities Act of 1976:

28 U.S.C. § 1391(f) 3

28 U.S.C. § 1441(d) 3, 4, 10, 11

28 U.S.C. §§ 1602 *et seq.* 1

28 U.S.C. § 1603 10

28 U.S.C. § 1603(a) 4, 10, 15, 17

28 U.S.C. § 1603(b) 4, 9, 15, 16, 17

28 U.S.C. § 1603(b)(1) 17

28 U.S.C. § 1603(b)(1)-(3) 15, 17

28 U.S.C. § 1603(b)(2) ..... *passim*

28 U.S.C. § 1603(d) 15

28 U.S.C. § 1604 3

28 U.S.C. § 1605 3

28 U.S.C. § 1605(a)(2) 4, 18

28 U.S.C. § 1608 3

28 U.S.C. § 1609 3

28 U.S.C. § 1610 3

28 U.S.C. § 1611 3

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1447(d) 11, 12

California Commodity Law of 1990, Cal. Corp. Code §§ 29500 *et seq.* 4

Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.* 4

British Columbia

British Columbia Hydro and Power Authority Act, [R.S.B.C. 1996], ch. 212 ..... 5, 6

§ 3(1) 5, 29

British Columbia Power for Jobs Development Act, [S.B.C. 1997], ch. 51 7

§ 2 8

§ 3 8

Constitution Act, 1867 (The British North America Act), 30 & 31 Vict., ch. 3 (U.K.), *reprinted in* [R.S.C. 1985], App. II, No. 5, § 125 9

Financial Administration Act, [R.S.B.C. 1996], ch. 138, *at* http://www.qp.gov.bc.ca/statreg/stat/F/96138_01.htm 8, 9

§ 1(b) 9

§ 4.1 9

§ 8 9

§ 30 9

Special Direction No. 8 to the British Columbia Utilities Commission, B.C. Reg. 71/98, amended by B.C. Regs. 72/98, 73/98, and 119,2000, §§ 3-5 8

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LEGISLATIVE MATERIALS

H.R. Rep. No. 94-1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604 ..... 3, 15, 16, 19, 20, 28

OTHER MATERIALS

BC Hydro:

2001 Annual Report (July 11, 2002) 25

2003 Annual Report (July 21, 2003) 25

2004 Annual Report (June 14, 2004) 25

2005 Annual Report (June 29, 2005) 25

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State Trade Fact Sheets 2002, *available at* http://www.dfait-maeci.gc.ca.....26

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Annual Report 2001 (Mar. 31, 2002).....25

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Annual Report 2004 (Mar. 31, 2005).....25

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49th Annual Report, *summary available at* http://www.hydro.mb.ca.....25

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53rd Annual Report (Aug. 11, 2004).....25

New Brunswick Power Corp.:

2000/01 Annual Report (June 28, 2001).....25

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Daniel Q. Posin, *The Multi-Faceted Investment Arbitration Rules of NAFTA*, 13 World Arb. & Mediation Rep. 13 (2002).....27

Report of the Working Group of the American Bar Association, *Reforming the Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. 489 (2002).....15

Restatement (Second) of Agency (1958).....29

Todd Weiler, *The Treatment of SPS Measures Under NAFTA Chapter 11: Preliminary Answers to an Open-Ended Question*, 26 B.C. Int'l & Comp. L. Rev. 229 (2003).....27

Powerex Corp. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

This case raises issues significant to the well-established practice of "governments throughout the world" using "separately constituted legal entities" to perform inherently sovereign functions. *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 624 (1983). It presents the same questions and involves the same petitioner as another petition for a writ of certiorari pending before this Court, *Powerex Corp. v. Reliant Energy Servs., Inc.*, No. 05-85 (docketed July 18, 2005).[1] This Court has directed the respondents in No. 05-85 to respond to that petition; that response is due on December 6, 2005. The pendency of these two petitions underscores the urgent need for this Court's review.

In No. 05-85, petitioner Powerex Corp. ("Powerex") seeks this Court's review of the Ninth Circuit's decision in *California v. NRG Energy Inc.*, 391 F.3d 1011 (2004) (Pet. App. 33a-49a). There, the Ninth Circuit erred in construing two aspects of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602 *et seq.* (the "FSIA"): first, in conflict with the Second, Third, and Fifth Circuits, the court defined an "organ of a foreign state or political subdivision" under § 1603(b)(2) in a mechanistic way that excludes pertinent evidence of the foreign sovereign's purpose in establishing the entity to perform international treaty and cross-border trade functions. Second, the Ninth Circuit created a test for a foreign state's ownership of a government corporation that ignores an agency relationship expressly created by statute, misapprehending this Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003). In No. 05-85, Canada and British

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[1] The arguments in this petition largely track those in No. 05-85, so that, if that case becomes mooted by subsequent events, the Court will have the benefit of the full presentation of issues in this case.

Columbia have taken the extraordinary step of filing *amicus curiae* briefs urging this Court to grant certiorari to reverse the Ninth Circuit.

Here, the Ninth Circuit dismissed Powerex's appeal, on the evident authority of *NRG Energy*. The court did not hold the case to await a decision by this Court on Powerex's pending certiorari petition, nor did it reconsider its *NRG Energy* holdings in light of the *amicus* briefs filed by the foreign sovereigns attesting to Powerex's sovereign status – filings the *NRG Energy* court did not have before it but that were before the Ninth Circuit in this case. The Ninth Circuit's judgment below exacerbates the conflicts created by *NRG Energy* with decisions of the Second, Third, and Fifth Circuits, as well as of this Court, on questions of exceptional importance to the United States' relationship with its largest trading partner.

Powerex was concededly created by the Province of British Columbia to sell electricity in the United States for the sole benefit of the Province from hydropower resources wholly owned and operated by the Province, and was likewise tasked by the Province to fulfill treaty obligations that the Province (and Canada) agreed to perform with the United States. The Ninth Circuit nonetheless has twice denied Powerex its rights under the FSIA to remove suits from state court and to enjoy the procedural safeguards (including the protection of a bench trial) that Congress has afforded to foreign sovereigns under the FSIA even when they are not eligible for substantive immunity.

The court's decision to follow *NRG Energy* in this case and to dismiss Powerex's appeal makes clear that Powerex will never get another opportunity to assert its FSIA rights in the U.S. judicial circuit in which it does the bulk of its business. Without this Court's review, every time that Powerex – or any other similarly situated entity – is sued within the Ninth Circuit's territorial jurisdiction, it will potentially face a lengthy jury trial in state court – a result the FSIA was intended to preclude. Because this case has profound effects on U.S.-Canada bilateral rela-

tions, the proper interpretation of the FSIA, and the commercial dealings of numerous foreign sovereign entities within the United States, this petition should be granted.

OPINIONS BELOW

The court of appeals' order dismissing Powerex's appeal (Pet. App. 1a) is unreported. The district court's opinion granting respondent's motion to remand (*id.* at 4a-15a) is unreported (but available at 2005 WL 2030718).

JURISDICTION

The court of appeals entered its judgment on October 6, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATY & STATUTORY PROVISIONS INVOLVED

Relevant treaty and statutory provisions are set forth at Pet. App. 50a-202a.

STATEMENT OF THE CASE

1. The FSIA grants foreign states substantive immunity from the jurisdiction of federal and state courts, *see* 28 U.S.C. § 1604, subject to certain enumerated exceptions, *see id.* § 1605. Even when one of those exceptions applies and a foreign state is unable to claim substantive immunity from suit, the FSIA and related statutory provisions afford various jurisdictional and procedural protections to that foreign state, *see id.* §§ 1391(f), 1441(d), 1608-1611. One of those procedural advantages is the right of removal to federal court. Under § 1441(d), "[a]ny civil action brought in a State court against a foreign state as defined in [the FSIA] may be removed by the foreign state to [federal] district court," where the case is tried without a jury. The right of removal under the FSIA is a critical congressional guarantee, "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area." H.R. Rep. No. 94-1487, at 32 (1976), 1976 U.S.C.C.A.N. 6604, 6631. The FSIA evinces Congress's intent "to channel cases against foreign sovereigns away from the state

courts and into federal courts." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983).

The FSIA defines a "foreign state" as any "agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). Section 1603(b) in turn defines an "agency or instrumentality of a foreign state" as any entity that (1) "is a separate legal person, corporate or otherwise"; (2) "is an organ of a foreign state" or "a majority of whose shares or other ownership interest is owned by a foreign state"; and (3) "is neither a citizen of a State of the United States" nor "created under the laws of any third country."

2. This action was originally filed in California state court by the California Attorney General ("California") against Powerex. California alleges that, from 1999 through 2001, Powerex engaged in fraudulent trading practices in the California wholesale energy market, in violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, and the California Commodity Law of 1990, Cal. Corp. Code §§ 29500 *et seq.* Powerex removed this case to federal district court by invoking the court's jurisdiction of cases against foreign states under § 1441(d) and § 1603(a) of the FSIA. Powerex acknowledged that it is not entitled to substantive immunity from suit (because its electricity sales in the United States constitute a "commercial activity" within the exceptions to sovereign immunity under the FSIA, *see* 28 U.S.C. § 1605(a)(2)). Even so, Powerex maintained that, as a foreign state, it was entitled to certain jurisdictional and procedural protections, in particular, the right to a federal forum, *see id.* § 1441(d). California moved to remand, which Powerex opposed.

3. Powerex supported its arguments below by referencing the undisputed evidence presented to the district court in *NRG Energy* and filed that evidence with the district court in this case.[2] That evidence showed that:

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[2] *See* Pet. App. 16a-18a. Subsequent Provincial statutory enactments have not altered those facts in any material respect.

In 1961, Canada and the United States signed the Columbia River Treaty (the "Treaty"),[3] under which Canada agreed to construct reservoir facilities in Canada to control the flow of the Columbia River in a way that would enable the United States to generate more power at its existing facilities on the Columbia River ("Downstream Benefits") and to provide enhanced flood control benefits to the U.S. Treaty art. II (Pet. App. 52a-53a). In return, Canada received a right to half of the Downstream Benefits over the 60-year life of the Treaty (the "Canadian Entitlement"). *Id.* art. V, § 1 (Pet. App. 55a). Canada and the United States were required to appoint "entities" to administer the Treaty. *Id.* art. XIV, § 1 (Pet. App. 63a).

In 1962, the British Columbia Provincial Government passed the British Columbia Hydro and Power Authority Act to establish an entity in which to hold assets it acquired and to promote major hydroelectric development, which included construction of significant storage dams and hydroelectric generating capacity on the Peace and Columbia River Systems (the "Two River Policy"). In 1964, the Provincial Government enacted another British Columbia Hydro and Power Authority Act ("Hydro Act"), which created the Provincial Crown Corporation known today as the British Columbia Hydro and Power Authority ("BC Hydro"). *See NRG Energy*, Pet. App. 39a. The Act enumerated all of BC Hydro's powers (including powers not generally available to private companies in British Columbia). The Act specifically provides that BC Hydro "is for all its purposes an agent of the government and its powers may be exercised only as an agent of the government." Hydro Act § 3(1) (Pet. App. 154a).

As a Provincial Crown Corporation, BC Hydro is owned in its entirety by Her Majesty the Queen in right of the Province of British Columbia ("Province"). Dividends

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[3] Treaty Between the United States of America and Canada Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, 15 U.S.T. 1555 (Pet. App. 50a-125a).

from BC Hydro's operations are payable only pursuant to Provincial directives. All substantive powers of BC Hydro are subject to, and can only be exercised with, the approval of the Lieutenant Governor in Council or the Minister responsible for BC Hydro. Since its inception, BC Hydro has implemented the Two River Policy by building dams, developing storage capacity, and operating hydroelectric generating facilities. *See* Pet. App. 20a.

In 1964, Canada designated BC Hydro as the Canadian entity responsible for administering the Treaty. The U.S. designated Bonneville Power Administration ("BPA") and the Army Corps of Engineers collectively as the United States entity. That same year, Canada, the Province, and the U.S. agreed to a Protocol for the implementation of the Treaty that provided, in a separate document, that the Province would receive an upfront payment in place of return of the first 30 years of the Canadian Entitlement.

By 1984, BC Hydro completed construction of the Revelstoke Dam on the Columbia River, the last major facility contemplated under the Two River Policy. Because the Province's storage capacity exceeded the Province's electricity needs, BC Hydro became an active seller of power in foreign commerce at the international border to U.S. entities, principally BPA. Such sales, as well as the trading of the Canadian Entitlement to BPA-generated power in exchange for an upfront cash payment, accorded with the British Columbia Government's aim under the Treaty of maximizing the hydroelectric production capacity of the Columbia and Peace Rivers. In the late 1980s, the Provincial Government overhauled the legislation governing the Province's energy sector. The aim of that legislation was to create a governmental structure for the sale of surplus power in the export market. *See id.* at 205a. In December 1988, BC Hydro – acting as agent of the Provincial Government under the Hydro Act – incorporated the British Columbia Power Exportation Corporation under the Company Act of British Columbia as a wholly owned subsidiary of BC Hydro to serve the vital role of

marketing the Province's surplus electric power. *See id.* at 23a. The company changed its name in 1991 to the British Columbia Power Exchange Corporation, and in 2000 to Powerex Corp. *See id.*

From its inception, Powerex performed functions prescribed by Provincial officials. It initially took delivery of the Province's electricity available for export at the British Columbia border and sold it at the border to U.S. and Alberta purchasers. In 1997, Powerex received authorization from the Federal Energy Regulatory Commission ("FERC") to make sales of electricity at wholesale in interstate commerce at market-based rates. Powerex then entered into transmission arrangements with U.S. utilities and participated directly in U.S. wholesale bulk power markets, including California.

In the early 1990s, the Province directed Powerex to explore means of creating a more efficient Provincial power market for the trading of electricity among utilities, independent power producers, industrial consumers, and other major electricity consumers. Powerex also participated with BC Hydro in direct negotiations with the Corps of Engineers and BPA to define the Canadian Entitlement because, early in those talks, the potential for resale of the Canadian Entitlement in the U.S. became a key aspect of the negotiations. Ultimately, in 1999, the Province assigned its rights, title, and interest in the Canadian Entitlement to Powerex, which directly transmits to the Province an index-based price for Canadian Entitlement energy. Any "profits" that Powerex earns from selling the Entitlement energy is consolidated with BC Hydro's net income, which, in turn, is available for distribution through the Province's general revenues and/or to a "Rate Stabilization Account" for maintaining lower electricity rated for the Province's citizens.

In 1997, the Province enacted the Power for Jobs Development Act ("Jobs Act"), which directed that portions of BC Hydro's surplus electricity, including a Provincial Government-determined portion of the Canadian Enti-

tlement otherwise available for sale by Powerex externally, would be diverted to British Columbia industry to create jobs. *See* Jobs Act § 2 (Pet. App. 181a). The Jobs Act directed BC Hydro and Powerex to supply power to British Columbia businesses on terms defined by the Provincial Government. *See id.* § 3 (Pet. App. 181a).

In addition, the Province directed Powerex to perform treaty obligations incurred by the Province under the U.S.-Canadian Skagit River Treaty.[4] In the late 1990s, Powerex took the lead in negotiating transmission arrangements, pursuant to which BPA agreed to deliver to Seattle the power that Powerex obtained from BC Hydro. *See* Pet. App. 26a-27a. Powerex's treaty responsibilities increased through a later assignment of certain BC Hydro rights and obligations under the Treaty to Powerex.

The uncontradicted evidence further showed that, pursuant to Provincial legislation and regulations, all of Powerex's earnings are consolidated with those of BC Hydro for purposes of establishing BC Hydro's electricity rates.[5] Under a formula set by Provincial laws and regulations, BC Hydro annually pays to the Province accumulated net income from the combined operations of BC Hydro and Powerex.[6] Because it is entirely owned by BC Hydro, which is the statutory agent of the Province, Powerex is also subject to the Financial Administration Act, pursuant

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[4] Treaty Between Canada and the United States of America Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D'Oreille River, Apr. 2, 1984, T.I.A.S. No. 11088, 1469 U.N.T.S. 309 (Pet. App. 126a-134a). Under that agreement, the City of Seattle agreed not to raise the High Ross Dam, which would have had the effect of flooding substantial areas of British Columbia. In exchange, British Columbia agreed to deliver substantial quantities of electricity to Seattle through 2066.

[5] Special Direction No. 8 to the British Columbia Utilities Commission, B.C. Reg. 71/98, amended by B.C. Regs. 72/98, 73/98, and 119.2000, §§ 3-5 (Pet. App. 194a-202a).

[6] Special Directive No. 4 to the British Columbia Hydro and Power Authority, O.I.c. 494/2000, §§ 5-8 (Pet. App. 191a-192a).

to which the Province: issues regulations or directives regarding the planning, management, and reporting of capital expenditures by government bodies; creates a special account under Provincial control for insurance and risk management services; requires financial and accounting operations to be reported to the Provincial Comptroller General; and mandates that investments, loans, and debts be administered through the Province.[7] The Lieutenant Governor in Council appoints BC Hydro's board of directors, and these Provincially appointed board members also constitute a majority of Powerex's board of directors. Those same Provincially appointed board members then appoint Powerex's remaining outside directors, subject to Provincial approval. *See id.* at 28a-29a.

BC Hydro further acts as Powerex's treasurer, and BC Hydro's borrowings in turn are guaranteed by the Province. *See id.* at 29a. Unlike private corporations, Powerex is exempt from income taxes under the Canadian and Provincial tax laws.[8]

4. a. In the district court, Powerex argued that it was entitled to remove this case to federal court as a foreign state's "instrumentality," within the meaning of § 1603(b), for two independent reasons. First, Powerex asserted that it performs a public activity on behalf of a foreign government and is therefore an "organ of a foreign state," under § 1603(b)(2). Second, Powerex argued that because the statutory agent of a foreign state – *i.e.*, BC Hydro – owns all of its stock, it is an entity "a majority of whose shares" are "owned by a foreign state," under § 1603(b)(2). *See* Def.'s Opp. to Mot. to Remand at 23-31.

Powerex recognized that the Ninth Circuit's recent decision in *NRG Energy*, which – as noted above – is the subject of a pending petition for certiorari, had denied

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[7] Financial Administration Act, [R.S.B.C. 1996], ch. 138, §§ 1(b), 4.1, 8, 30, *at* http://www.qp.gov.bc.ca/statreg/stat/F/96138_01.htm.

[8] Constitution Act, 1867 (The British North America Act), 30 & 31 Vict., ch. 3 (U.K.), [R.S.C. 1985], App. II, No. 5, § 125 (Pet. App. 150a).

Powerex's claim to foreign-state status under § 1441(d) and § 1603(a) of the FSIA. *See* Def.'s Opp. to Mot. to Remand at 23 n.11. But Powerex argued that *NRG Energy* foreclosed only one of its two grounds for removal under § 1441(d). Although that case had rejected Powerex's first contention – that it is an organ of a foreign state – Powerex asserted that the *NRG Energy* panel had failed to address Powerex's second argument – that the Province's ownership of Powerex through its agent satisfies the second clause of § 1603(b)(2). That panel had found it dispositive that "Power[e]x is not owned by the Province but by BC Hydro," Pet. App. 48a, noting that, under this Court's decision in *Dole Food*, 538 U.S. at 474, tiered or indirect ownership of a majority of shares by a foreign state does not, without more, satisfy the FSIA's statutory requirements. But the *NRG Energy* court failed to recognize that Powerex was not making a claim of indirect ownership – Powerex's argument was that it is, in fact, directly owned by the Province, through an agent created by Provincial statute, BC Hydro. Powerex thus asserted that the court here was free to deny remand based on Powerex's second contention, without transgressing the binding precedent of *NRG Energy*. *See* Def.'s Opp. to Mot. to Remand at 29. In addition, Powerex reiterated its position that it is an organ of the Province under § 1603's fact-sensitive standard. *See id.* at 26-29.

b. The district court in this case peremptorily concluded that § 1441(d) and the FSIA did not entitle Powerex to remove this case, and it granted California's motion to remand. The court's cursory analysis of Powerex's asserted right to remove under § 1441(d) consisted principally of a quotation from *NRG Energy*: "Powerex is 'not a foreign instrumentality under FSIA.'" Pet. App. 14a (quoting Pet. App. 48a). The court misunderstood Powerex's second argument, apparently believing that Powerex was claiming that its corporate structure had changed since *NRG Energy* was decided. Like the *NRG Energy* panel before it, the district court here incorrectly

restated Powerex's argument as a claim of indirect ownership. It reasoned that, "[a]lthough Powerex is owned by BC Hydro and BC Hydro is an agent of the Province, the Province does not itself own a majority of the shares of Powerex" and therefore "Powerex is not a foreign state for purposes of FSIA," *id.* at 14a-15a, as that statute was interpreted by this Court in *Dole Food*.

c. The day the district court's judgment was entered on the docket, Powerex filed a notice of appeal and requested a stay of the court's remand order pending resolution of the appeal, which the district court denied.

5. Powerex then filed in the Ninth Circuit a motion to stay the remand order. The court of appeals ordered Powerex to show cause why its appeal should not be dismissed for lack of jurisdiction, noting that an order remanding a removed action to state court for lack of subject-matter jurisdiction is generally not reviewable by a court of appeals. *See* Pet. App. 2a-3a (citing § 1447(d)).

In its response, Powerex pointed out that, in the *NRG Energy* appeal, which was in the same procedural posture as this case, the Ninth Circuit twice held that it had jurisdiction to review an order concluding that Powerex was not entitled to remove under § 1441(d) and the FSIA and remanding that case to state court. First, a motions panel in *NRG Energy* discharged a show-cause order similar to the one issued in this case after determining that the court had jurisdiction to entertain the appeal. *See* Order at 2, *California v. NRG Energy Inc.*, Nos. 02-57200 *et al.* (9th Cir. Feb. 20, 2003). Second, the court's opinion disposing of that appeal on the merits reaffirmed the motions panel's determination, explaining that § 1447(d) does not preclude a court of appeals' review of a district court's resolution of a substantive issue on the merits – such as a defendant's status as a foreign state under the FSIA – that is separable from the order of remand. *See NRG Energy*, Pet. App. 42a.

After reviewing the parties' responses to its order to show cause, the Ninth Circuit dismissed Powerex's appeal

in a two-sentence order, citing § 1447(d) and this Court's decision in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995). *See* Pet. App. 1a.[9]

REASONS FOR GRANTING THE PETITION

1. The Ninth Circuit's decisions in *NRG Energy* and this case conflict with the decisions of three other circuits on an issue of critical importance to the unhindered flow of cross-border and international commerce. Contrary to the Ninth Circuit's erroneous rulings, Powerex is no mere for-profit energy corporation. Rather, it is an "organ" of a foreign state because its creation, purposes, conduct, and operations all reflect the public policy judgments of British Columbia, as enacted by Provincial statute and administered by public officials. Treating Powerex as a

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[9] The court of appeals' dismissal of this appeal for lack of jurisdiction presents no impediment to this Court's consideration of this matter, because it was not based on the general rule that an appellate court lacks jurisdiction under § 1447(d) to review an order of remand. Indeed, it could not have been. The court in this case was bound by the *NRG Energy* panel's correct conclusion that the resolution of a removing party's claim to foreign-state status under the FSIA is a legal ruling preceding the decision to remand that can be reviewed on appeal consistent with § 1447(d). *See* Pet. App. 42a. If the court of appeals had here concluded that § 1447(d) barred any review of the district court's determination that Powerex was not a foreign state entitled to remove under the FSIA, that conclusion would have conflicted with the Ninth Circuit's holding to the contrary in *NRG Energy*, in violation of the well-settled principle that a panel cannot overrule a decision of a prior panel. *See, e.g., United States v. Rodriguez-Lara*, 421 F.3d 932, 943 (9th Cir. 2005). Thus, the only plausible interpretation of the court of appeals' decision to dismiss this appeal is that the panel considered Powerex's contentions under the FSIA, but believed that those arguments had been foreclosed by *NRG Energy*'s conclusion that Powerex was not entitled to remove under that statute. Because the court found that the legal issues presented in this case had been resolved in *NRG Energy*, there was no live substantive issue separable from the remand order over which the panel could have jurisdiction. Consequently, the panel in this case dismissed Powerex's appeal for lack of jurisdiction. The Ninth Circuit's dismissal of this appeal was therefore based on its decision to adhere to *NRG Energy*'s rejection of Powerex's claim of foreign-state status under the FSIA, not on the general bar to appellate review in § 1447(d).

purely private, commercial enterprise disregards the Province's governmental role in cross-border electricity trade and water management in accordance with treaties between Canada and the United States. Powerex's electricity sales, which the court of appeals seized on as evidence of a private, not public, purpose, are not taxed like an ordinary private commercial enterprise but rather are used to generate "profits" back to the Provincial government to stabilize the rates that citizens pay for electricity, to comply with Provincial statutes to subsidize British Columbia businesses, or to meet other Provincial budgetary needs and public purposes. As a Provincial organ, Powerex is subject to a host of unique burdens, such as Provincial oversight, while enjoying benefits such as financial support from the Province and immunity from Provincial and federal taxation that private entities do not share.

The Ninth Circuit's mechanical approach to the interpretation of § 1603(b)(2) makes all of those facts legally irrelevant and, consequently, renders insignificant the core question of whether the entity "engages in activity serving a national interest and does so on behalf of its national government." *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 209 (3d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004). Because this case would have come out differently in the Second, Third, and Fifth Circuits, which reject a categorical approach in favor of a totality-of-the-circumstances inquiry, this Court should grant certiorari.

The practical consequences of the Ninth Circuit's decisions are clear. Foreign governments will be exposed to the ad-hoc decision making of state courts within the Ninth Circuit's territorial reach for conduct that, in other circuits, remains appropriate for federal review under nationally uniform standards. If governmental entities are denied the jurisdictional and substantive protections of the FSIA because of the Ninth Circuit's restrictive, mechanistic test, there will be a chilling effect on future trade activity to the region's detriment. The Ninth Circuit's adherence to *NRG Energy* also brings the U.S. into

conflict with its cross-border partners, as evidenced by the *amicus* filings of Canada and the Province in No. 05-85.

2. The Ninth Circuit's second holding in *NRG Energy*, which the district court followed in this case and the court of appeals declined to revisit, also raises a question of great significance. The court misread the rule established by this Court in *Dole Food* that Congress intended the requirement of an "ownership interest" in § 1603(b)(2) of the FSIA to be governed by the common law standards applicable to private corporations. Notwithstanding this Court's guidance, the Ninth Circuit's interpretation of the FSIA absolutely precludes the application of common law principles of agency to entities owned by foreign governments through statutory agents in determining whether an entity is "owned" by the foreign government. That rule ignores the common law of corporate agency under which BC Hydro's ownership of Powerex is imputed to its principal, British Columbia. The Ninth Circuit's decisions in *NRG Energy* and this case thus confuse "ownership" with "control" and invert this Court's holding to mean that "as a categorical matter" all agents are deemed distinct from their principals. *Dole Food*, 538 U.S. at 475-76.

Finally, the Ninth Circuit's decision to follow *NRG Energy* in this case without discussion confirms that plenary review by this Court is Powerex's only avenue for obtaining meaningful appellate consideration of its claims. Denial of that review would force Powerex to defend itself against multiple suits in state court, stripped of the jurisdictional and procedural protections guaranteed it by Congress in the FSIA.

I. THE NINTH CIRCUIT CREATED A MULTI-CIRCUIT CONFLICT ON WHAT CONSTITUTES AN FSIA "ORGAN" OF A FOREIGN STATE

A. The Ninth Circuit's New Standard Eliminates The Fact-Specific Analysis Congress Imposed

1. The Ninth Circuit fundamentally misunderstood that Congress intended for courts to examine foreign enti-

ties claiming "organ" status under the FSIA by employing a fact-sensitive inquiry that considers a range of characteristics. The FSIA defines a "foreign state" broadly to include both the sovereign nation itself, and any "agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a); *see Gates v. Victor Fine Foods*, 54 F.3d 1457, 1460 (9th Cir. 1995) (concluding that Congress "intended the terms 'organ' and 'agency or instrumentality' to be read broadly"). Section 1603(b) defines an agency or instrumentality to include any entity that (1) "is a separate legal person, corporate or otherwise," (2) "is an organ of a foreign state" or "a majority of whose shares or other ownership interest is owned by a foreign state," and (3) "is neither a citizen of a State of the United States" nor "created under the laws of any third country." 28 U.S.C. § 1603(b)(1)-(3). Powerex indisputably is a separate legal entity and a citizen of neither the United States nor some third country. The only issue, therefore, is whether Powerex is an "organ" under § 1603(b)(2).

Congress did not define "organ." Nonetheless, commentators have consistently recognized that the fact-sensitive organ test is necessary to address entities that "might not have ownership interests familiar to American judges or lawyers, but that have close connections with the state."[10] Nor is Congress's silence on the definition of a foreign "organ" unusual in the FSIA. Section 1603(d) defines a "commercial activity" only by "reference to the nature of the course of conduct." As the FSIA legislative history explains, this vague standard reflects the view that "[i]t has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable." H.R.

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[10] Joseph W. Dellapenna, *Refining the Foreign Sovereign Immunities Act*, 9 Willamette J. Int'l L. & Disp. Resol. 57, 81 (2001); *see also* Report of the Working Group of the American Bar Association, *Reforming the Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. 489, 516 (2002); Joseph W. Hardy, Jr., Note, *Wipe Away the Tiers: Determining Agency or Instrumentality Status Under the Foreign Sovereign Immunities Act*, 31 Ga. L. Rev. 1121, 1161 (1997).

Rep. No. 94-1487, at 16, 1976 U.S.C.C.A.N. at 6615. Instead, Congress granted the courts "a great deal of latitude in determining what is a 'commercial activity.'" *Id.* The omission of a precise definition of "organ" thus indicates Congress's intent to provide the courts with a broad and flexible standard for evaluating whether an entity is a foreign sovereign's "organ." *See Gates*, 54 F.3d at 1460 (concluding that Congress "intended the terms 'organ' and 'agency or instrumentality' to be read broadly").

2. The Ninth Circuit's decisions in *NRG Energy* and this case, which build on its prior decision in *Dole Food*, honor none of these principles and instead embrace a mechanical and inflexible approach to organ status under the FSIA.[11] The court determines organ status using none of the flexible and fact-specific analysis envisioned by Congress that would address the creation, composition, and daily functions of the entity. Instead, the Ninth Circuit in *NRG Energy* engaged in a rigid (and circumscribed) analysis of four factors: (1) the purpose of the entity's activities; (2) the entity's independence from the government; (3) the level of financial support from the government; and (4) the entity's immunity from suit. *See* Pet. App. 47a. That test disregards any consideration of critical characteristics such as the circumstances surrounding the entity's creation, employment requirements, or structures imposed by the foreign government that other cir-

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[11] Although this Court affirmed the Ninth Circuit's decision in *Dole Food*, its review was limited to the meaning of "ownership" in § 1603(b)(2), which extends agency or instrumentality status to an entity "a majority of whose shares or other ownership interest is owned by a foreign state." 28 U.S.C. § 1603(b)(2); *see Dole Food*, 538 U.S. at 471 (explaining question presented as whether "a corporate subsidiary can claim instrumentality status where the foreign state does not own a majority of shares but does own a majority of the shares of a corporate parent one or more tiers above the subsidiary"). In addition, this Court held that instrumentality status under § 1603(b) must be determined at the time the suit is filed. *See* 538 U.S. at 478. This Court did not review the Ninth Circuit's analysis of organ status under the FSIA.

cuits have specifically held are crucial attributes of an organ's sovereign status. *See* pp. 20-21, *infra*.

Moreover, the characteristics deemed dispositive by the Ninth Circuit are contrary to both the FSIA's text and logic. First, the "degree of independence" inquiry conflicts with § 1603(a), which expressly states that the term "foreign state" "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). Section 1603(b) defines an agency or instrumentality to include any entity that (1) "is a separate legal person, corporate or otherwise," (2) "is an organ of a foreign state or political subdivision" of a foreign state, and (3) "is neither a citizen of a State of the United States" nor "created under the laws of any third country." *Id.* § 1603(b)(1)-(3). The Ninth Circuit held that Powerex's "high degree of independence" from the Province denied it organ status, *NRG Energy*, Pet. App. 48a, but, to be an agency or instrumentality at all, the entity must be "a separate legal person, corporate or otherwise," 28 U.S.C. § 1603(b)(1). The Ninth Circuit's approach thus functionally nullifies a statutory prerequisite for a sovereign "agency or instrumentality" because it posits that an independent entity *cannot* be the sovereign's "organ."[12]

Second, the Ninth Circuit's "lack of financial support from the government" prong (*NRG Energy*, Pet. App. 48a) finds no support in the text of the FSIA or in logic.[13] The

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[12] *Cf. EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 640 (9th Cir.) (concluding that organ status remains appropriate even where the entity "has some autonomy from the foreign government"), *cert. denied*, 540 U.S. 1003 (2003); *EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Co.*, 257 F.3d 992, 997 (9th Cir. 2001) (explaining that organ status is not defeated "even though the government was not involved in the day-to-day activities" of the entity); *see also Gates*, 54 F.3d at 1461 ("that the Province is not directly involved in the day-to-day activities of [an agency] does not mean that it is not exercising control over the entity").

[13] Worse still, the Ninth Circuit's application of its erroneous legal standard is not even supported by the record facts. Powerex does enjoy financial support from the Province, relying on the Province's credit

text, in fact, rebuts the Ninth Circuit's suggestion because a foreign sovereign can still retain its sovereign status when it engages in "commercial activity" even though it will not be immune from suit. 28 U.S.C. § 1605(a)(2). On that basis, numerous courts have held that a foreign sovereign entity engaging in commercial activity – such as Powerex – is still entitled to remove a suit from state court and to litigate in federal court under procedural protections afforded by the FSIA. *See, e.g., USX*, 345 F.3d at 209; *EIE Guam*, 322 F.3d at 635. That is because, notwithstanding an absence of substantive immunity, "[t]he FSIA is the exclusive source of subject matter jurisdiction over suits involving foreign states and their instrumentalities." *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 654 (9th Cir. 1996). Nothing in the text suggests that Congress intended to distinguish between sovereigns engaging in commercial activity that need to be subsidized by the government and those that do not. And such a notion is flatly inconsistent with the U.S. government's practice, which operates instrumentalities such as BPA to generate low-cost electricity for consumers and affords those instrumentalities complete immunity from suit.

Finally, the Ninth Circuit's fourth categorical factor – whether the foreign entity received "special privileges or obligations" under the foreign sovereign's law – was defined by the court in *NRG Energy* as solely whether the foreign entity was immune from suit under foreign law. Pet. App. 48a. That factor, however, ignores that a foreign sovereign can imbue its organs with numerous "privileges or obligations" without necessarily conferring immunity from suit. In Powerex's case, those "privileges or obligations" include exemption from Provincial and federal taxation,[14] a remittance of income to BC Hydro's

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rating to support its trades in the electricity market and financial guarantees issued by BC Hydro in support of Powerex's export trade.

[14] *See, e.g., Bolden v. Southeastern Pennsylvania Transp. Auth.*, 953 F.2d 807, 820 (3d Cir. 1991) (en banc) (discussing "attributes associ-

consolidated financial statement or directly to the Province, and a mandate that the organ perform treaty functions and governmental purposes not required of private entities. As a litmus test, the one chosen by the Ninth Circuit below is especially odd and regressive. Strikingly, such a test ignores that Congress, in requiring an organ of a foreign state to be a "separate legal person," specifically intended the term to encompass "a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, *can sue or be sued in its own name*, contract in its own name or hold property in its own name." H.R. Rep. No. 94-1487, at 15, 1976 U.S.C.C.A.N. at 6614 (emphasis added). Instead, the Ninth Circuit's test would impose on foreign sovereigns a duty under their own law to make their organ immune from suit solely so they could litigate in a United States federal court *without* substantive immunity under the commercial activities exception. Nothing in the text or purposes of the FSIA compels such a strange result.

B. The Ninth Circuit's Decisions Conflict With Three Circuits On Whether A Commercial Entity Performing Government Functions Is An Organ Of A Foreign State

1. By adhering to *NRG Energy*, the Ninth Circuit below applied a standard for determining organ status under the FSIA that differs from the existing majority test and exacerbates a significant split of authority among four federal circuits. Consequently, foreign governments now lack a "predictable, uniform jurisdictional scheme" under the FSIA. *See* Dellapenna, *supra*, 9 Willamette J. Int'l L. & Disp. Resol. at 92. That result cannot be squared with Congress's intent in passing the FSIA to confer "broad jurisdiction in the Federal courts" to ensure "uniformity in decision, which is desirable since a disparate treatment of

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ated with sovereignty" including exemption from taxation); *Gorenc v. Salt River Project Agric. Improvement & Power Dist.*, 869 F.2d 503, 507 (9th Cir. 1989) (explaining that "immun[ity] from taxation on the sale of electricity" is an "attribute[] of . . . sovereign[ty]").

cases involving foreign governments may have adverse foreign relations consequences." H.R. Rep. No. 94-1487, at 13, 1976 U.S.C.C.A.N. at 6611; *see also Davis v. McCourt*, 226 F.3d 506, 509 (6th Cir. 2000) ("Congress enacted the FSIA in part to create a uniform body of law by establishing federal courts as the preferred forum for cases involving foreign states.").

Applying those principles, a majority of circuits has rejected the rigid analysis adopted by the Ninth Circuit in this case and concluded that "an entity that engages in activity serving a national interest and does so on behalf of its national government qualifies for the protections of the FSIA, including a federal forum." *USX*, 345 F.3d at 209. In making that assessment, those courts examine six separate and independent factors: (1) the "circumstances surrounding the entity's creation"; (2) the "purpose of its activities"; (3) the entity's "independence from the government"; (4) the "level of government financial support"; (5) the entity's "employment policies"; and (6) the entity's "obligations and privileges under the foreign state's law." *Id.* at 206, 209; *see also Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir.), *cert. denied*, 125 S. Ct. 677 (2004); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-47 (5th Cir. 2000). A host of district courts likewise follows the majority's multi-factor approach.[15] Mindful, however, that Congress intended to accord foreign entities "immunity not only from liability, but from the burdens of litigation as well," these courts will "*not* apply them mechani-

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[15] *See, e.g., In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 790-91 (S.D.N.Y. 2005); *RSM Prod. Corp. v. Petroleos de Venezuela Societa Anonima*, 338 F. Supp. 2d 1208, 1215 (D. Colo. 2004); *Shirobokova v. CSA Czech Airlines, Inc.*, 335 F. Supp. 2d 989, 991 (D. Minn. 2004); *Filler v. Hanvit Bank*, 247 F. Supp. 2d 425, 428 (S.D.N.Y. 2003), *vacated in part on other grounds*, Nos. 01 Civ. 9510 *et al.*, 2003 WL 21729978 (S.D.N.Y. July 25, 2003), *aff'd*, 378 F.3d 213 (2d Cir.), *cert. denied*, 125 S. Ct. 677 (2004); *United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, No. 97 Civ. 6124, 1999 WL 307666, at *5 (S.D.N.Y. May 17, 1999), *aff'd*, 199 F.3d 94 (2d Cir. 1999); *Supra Med. Corp. v. McGonigle*, 955 F. Supp. 374, 378-79 (E.D. Pa. 1997).

cally or require that all . . . support an organ-determination." *Kelly*, 213 F.3d at 847; *see also USX*, 345 F.3d at 207, 209 (noting "congressional goals of promoting uniformity of decision and avoiding impairing foreign relations," and holding "no one [factor] is determinative").

2. The Ninth Circuit initially appeared to have adopted a standard comparable to that of the other circuits. *See Gates*, 54 F.3d at 1460-61 (concluding that the Alberta Pork Producers Development Corporation, a Canadian entity established pursuant to a Provincial statute, constituted an organ of the Province because it was established pursuant to Provincial statute and served Provincial public policy purposes); *Corporacion Mexicana*, 89 F.3d at 655 (holding that Pemex Refining qualified as an organ of the Mexican government).

In *Dole Food*, however, the Ninth Circuit adopted a new test that contrasted with Congress's expectation that the FSIA would govern jurisdiction over suits brought against a foreign state's organ engaged in commercial activities. The court considered the organ status of entities "created by Israel" to "exploit[] the Dead Sea resources owned by the government" and "classified as 'government companies' under Israeli law." *Patrickson v. Dole Food Co.*, 251 F.3d 795, 808 (9th Cir. 2001), *aff'd in part*, 538 U.S. 468 (2003). In addition, the government "had the right to approve the appointment of directors and officers, as well as any changes in the capital structure" of the entities, and the power to "constrain" the entities' use of profits as well as the salaries of the directors and officers. *Id.*

Although acknowledging those facts, and characterizing the question as "close," the *Dole Food* court ultimately concluded that the entities did not qualify as instrumentalities under the FSIA. The court based its conclusion on the absence of any "regulatory authority" by the entities and the entities' employment of private rather than civil servants. *Id.* The court did not explain what, if any, significance it attributed to the circumstances surrounding Israel's creation of the entities or the concededly public

purpose of exploiting governmental resources. *Dole Food* thus shifted away from the sound approach of the Second, Third, and Fifth Circuits by de-emphasizing certain attributes of sovereignty while elevating the importance of commercial activities in denying FSIA protections.

3. The court's decision in this case now confirms that the Ninth Circuit has indeed rejected the contextual approach advanced by other circuits, thereby creating a clear split of authority on the meaning of a key provision in the FSIA. The Ninth Circuit's new approach ignores two basic factors relied on by the other circuits to determine an entity's organ status. First, the Ninth Circuit no longer considers the circumstances surrounding the creation of a governmental entity. It is illogical, however, to attempt to determine whether an entity serves a sovereign purpose on behalf of a foreign government without any consideration of the circumstances that led to its creation. *See USX*, 345 F.3d at 210. Second, the Ninth Circuit gives no weight to the employment policies and responsibilities of the entity. Yet employment policies are a common means of imposing governmental oversight and furthering the public mission of a governmental agency.

The Ninth Circuit's test renders both factors irrelevant or insufficient. There is simply no reading of the Ninth Circuit's decision in *NRG Energy*, therefore, that will reconcile the court's new "categorical" approach to an entity's sovereign status with the decisions of the other circuits where no one factor is deemed "determinative." *USX*, 345 F.3d at 209; *Kelly*, 213 F.3d at 847.

4. Had the Ninth Circuit below applied the totality-of-the-circumstances approach to organ status accepted in the Second, Third, and Fifth Circuits, which includes assessing the circumstances of Powerex's creation and the employment policies imposed by the Province of British

Columbia, the court would have readily concluded that Powerex qualified as an "organ" of British Columbia.[16]

First, the circumstances surrounding Powerex's creation establish a sovereign purpose and thus "weigh more heavily in favor of organ status." *USX*, 345 F.3d at 210. Powerex was created by a directive of the Province's Minister of Energy to act as the Province's exclusive export agency for marketing the Province's governmentally owned and generated surplus hydropower capacity in a manner that maximized benefits to British Columbia and its citizens. *See Corporacion Mexicana*, 89 F.3d at 655 (Pemex Refining qualified as an organ of the Mexican government because it was "created by the Mexican Constitution, Federal Organic Law, and Presidential Proclamation" and granted "exclusive responsibility of refining and distributing Mexican government property").

To fulfill those goals, Powerex was created as a wholly owned subsidiary of a Canadian Crown Corporation of the Province that is the Province's agent by statute. Powerex was also assigned Provincial treaty rights and obligations under the Columbia River Treaty and the Skagit River Treaty, and now carries out treaty obligations concerning natural resources within the Province's exclusive control. Powerex is inseparable from the Province in critical respects (including use of the Province's credit rating) and is directly controlled by the Provincial Government through its role in appointing and approving the members of Powerex's board. Finally, Powerex's revenue does not result in private "profits," but is instead consolidated with those of its parent, BC Hydro, and made available for distribution for public purposes through the Province's consoli-

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[16] This Court has explained that, while "[i]t is not customary for this Court to review the sufficiency of the evidence, . . . we will do so when the issue is properly before us and the benefits of providing guidance concerning the proper application of a legal standard and avoiding the systemic costs associated with further proceedings justify the required expenditure of judicial resources." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993) (collecting cases).

dated general revenues (or, in the case of the Canadian Entitlement, made available directly to the Province).

By ignoring the circumstances of Powerex's creation, the Ninth Circuit failed to consider the "national purpose" that Powerex serves in marketing energy produced from British Columbia's water resources and in performing treaty obligations for the Province and Canada. *See Kelly*, 213 F.3d at 848 (entity was created for a national purpose "because it was formed by government decree to develop and explore Syria's mineral resources, control over which is a basic aspect of sovereignty").

Second, the employment policies imposed on Powerex by the Province indicate the public nature of Powerex's functions. Although not considered by the Ninth Circuit, Powerex is controlled by governmental appointees. The Lieutenant Governor in Council (the Executive Council of the Province) directly appoints BC Hydro's board of directors, which, in turn, appoints the Powerex board. *See* Pet. App. 28a-29a. A subset of the Provincially appointed BC Hydro board constitutes the majority of the seven seats on Powerex's board, and the remaining outside directors must be confirmed by the Premier's office. *See id.* at 29a.

Moreover, while the Province does not directly pay the salaries of Powerex employees, Powerex must comply with Provincial guidelines for public employee compensation. *See id.* at 32a. These guidelines constrain Powerex from paying rates to its employees that are equal to those paid by private energy companies. The Province also guarantees the pension benefits of Powerex's employees. *Cf. USX*, 345 F.3d at 213 (participation in private rather than public pension plan does not support organ status).

Those facts, together with Powerex's exemption from Provincial or federal taxation and its access to BC Hydro financial support for export trade transactions, confirm that, under the plain meaning of "organ" in § 1603(b)(2) uniformly applied by the Second, Third, and Fifth Cir-

cuits, the Ninth Circuit should have reversed the district court's ruling that the case was not properly removed.[17]

C. Uniform Application Of The FSIA's Protections Is Critically Important To Foreign Governments Conducting Business In The U.S.

The volume of commerce that will be affected by the Ninth Circuit's rulings is staggering. From 2000 through 2004, a mere three Canadian crown corporations – Hydro-Quebec, New Brunswick Power Corp., and Manitoba Hydro-Electric Board – exported more than $13.8 billion Canadian of energy products into the United States, and Powerex itself exported $10.9 billion Canadian.[18] In 2001-

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[17] In addition to misunderstanding the facts and law of the factors on which it *did* rely, the *NRG Energy* court erred in perceiving the Dead Sea Companies in *Dole Food* as the most analogous entities. *See* Pet. App. 47a-48a. The Dead Sea Companies in *Dole Food* were not wholly owned by the government, did not perform treaty functions, and did not return profits to the government. Rather, the proper analogy should have been to *EIE Guam*, 322 F.3d at 640-41. There, as here, the government had created the corporation "to perform a public function" and "'to carry out [the foreign government's] national policy.'" *Id.* at 640. The government had also vested exclusive authority in and provided funding for the corporation "'to perform' such activities.'" *Id.* In all respects, Powerex is like the government corporation in *EIE Guam*, which was permitted to remove a case filed in Guam territorial court and to litigate instead in federal court. *See id.* at 637.

[18] *See* Hydro-Quebec, *Annual Report 2004*, at 107 (Mar. 31, 2005); Hydro-Quebec, *Annual Report 2002*, at 97 (Mar. 31, 2003); Hydro-Quebec, *Annual Report 2001*, at 91 (Mar. 31, 2002); BC Hydro, *2005 Annual Report* at 109 (June 29, 2005); BC Hydro, *2004 Annual Report* at 124 (June 14, 2004); BC Hydro, *2003 Annual Report* at 127 (July 21, 2003); BC Hydro, *2001 Annual Report* at 67 (July 11, 2002); New Brunswick Power Corp., *2003/04 Annual Report* at 47 (June 30, 2004); New Brunswick Power Corp., *2002/03 Annual Report* at 44 (June 30, 2003); New Brunswick Power Corp., *2001/02 Annual Report* (June 28, 2002); New Brunswick Power Corp., *2000/01 Annual Report* at 45 (June 28, 2001); Manitoba Hydro-Electric Board, *53rd Annual Report* at 87 (Aug. 11, 2004); Manitoba Hydro-Electric Board, *51st Annual Report* at 51 (July 29, 2002); Manitoba Hydro-Electric Board, *49th Annual Report, summary available at* http://www.hydro.mb.ca.

2003, Canada's energy exports to Ninth Circuit states totaled more than $20.9 billion.[19]

When, inevitably, disputes regarding that cross-border commerce arise within the Ninth Circuit's territorial reach, entities sharing the characteristics of Powerex will be subject to major uncertainties about their procedural and substantive rights under the FSIA. Should the Ninth Circuit's new interpretation of § 1603(b)(2) stand, corporations created by foreign governments will face not only the prospect of being confined to state court – no mere idle concern given that California's federal district judges have recused themselves in cases arising out of the California energy crisis of 2000-2001 but California's state judges have not – but also a loss of the very sovereign immunity protections codified in the FSIA. *Cf. Davis*, 226 F.3d at 511 ("FSIA seeks to provide uniformity in the treatment of foreign sovereigns and to remove any local bias that might be present at a jury trial in a state court."). In stark contrast, foreign entities operating within the Second, Third, and Fifth Circuits will continue to benefit from the multi-factor, fact-sensitive approach to determining organ status. As a result, plaintiffs seeking to sue foreign sovereign corporations will have every incentive to engage in forum shopping by suing in state court in Ninth Circuit states, a phenomenon that portends a chilling effect on future cross-border and international trade, or, even worse, may spark international trade disputes.

D. The Ninth Circuit's Decisions Create Significant Tensions With The U.S.'s Duties Under The North American Free Trade Agreement

Resolution of the circuit conflict exacerbated by the Ninth Circuit's adherence to *NRG Energy* is critically im-

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[19] Canadian Embassy, *State Trade Fact Sheets 2004*, *available at* http://www.canadianembassy.org; Canadian Embassy, *State Trade Fact Sheets 2003*, *available at* http://www.dfait-maeci.gc.ca; Canadian Embassy, *State Trade Fact Sheets 2002*, *available at* http://www.dfait-maeci.gc.ca.

portant to avoid disrupting the growth of cross-border trade under NAFTA.[20] In *NRG Energy*, the Ninth Circuit upheld the district court's ruling that BPA and the Western Area Power Administration ("WAPA"), two federal agencies that are "statutorily authorized to promote the development, sale, and distribution of electric power in the western United States," possess sovereign immunity from suit. *See* Pet. App. 39a, 43a. NAFTA Article 1102(1) makes clear that the U.S. must guarantee Powerex "treatment no less favorable than it accords, in like circumstances," to domestic investors. NAFTA art. 1102(1), 32 I.L.M. at 639 (Pet. App. 135a). This "broad requirement" establishes that there "shall be no discrimination by a Party as between domestic and foreign investors." Daniel Q. Posin, *The Multi-Faceted Investment Arbitration Rules of NAFTA*, 13 World Arb. & Mediation Rep. 13, 13-14 (2002). By treating other comparable and functionally similar U.S. wholesale power suppliers such as BPA and WAPA as sovereign entities while denying Powerex's status as a foreign sovereign – even though BPA and Powerex alike perform governmental duties under the Columbia River Treaty – the decision below gives an unfair national benefit to a U.S. entity in discrimination against a Canadian entity.

Such treatment violates NAFTA standards and unnecessarily entangles the courts in matters of foreign economic policy entrusted to the Executive Branch. *See* Todd Weiler, *The Treatment of SPS Measures Under NAFTA Chapter 11: Preliminary Answers to an Open-Ended Question*, 26 B.C. Int'l & Comp. L. Rev. 229, 241 (2003) (the goal of the non-discrimination clause "is to provide the foreign firm with the promise of an effective equality of competitive opportunities between it and its competitors"). Moreover, by applying a different standard for

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[20] North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, done Dec. 17, 1992, 32 I.L.M. 289 ("NAFTA").

organ immunity to Powerex than previously applied to foreign investments by a Mexican entity (in *Corporacion Mexicana*), the Ninth Circuit's decisions fail to "accord to investors of [the Province] treatment no less favorable than that it accords, in like circumstances, to investors of any other" NAFTA member nation. NAFTA art. 1103(1), 32 I.L.M. at 639 (Pet. App. 136a). The Court should thus grant certiorari to correct the Ninth Circuit's erroneous view of the FSIA and the resulting tension with the principle of non-discrimination underlying NAFTA.

II. THE NINTH CIRCUIT'S "OWNERSHIP" HOLDING CONFLICTS WITH *DOLE FOOD*

The Ninth Circuit also erred in conflict with this Court's guidance on a second issue of great significance: the court rejected Powerex's argument that common law principles of agency remain applicable to entities owned by foreign governments through statutory agents in determining whether an entity is "owned" by the foreign government. By holding that such principles do not apply, the Ninth Circuit's test for ownership conflicts with this Court's precedent on an issue with substantial ramifications for corporate agencies of all foreign governments.

Section 1603(b)(2) defines an agency or instrumentality of a foreign state to include both an organ of the foreign state and an entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." In *Dole Food*, this Court held that courts must construe § 1603(b)(2) using the "basic tenet[s]" of American corporate law. 538 U.S. at 474. The Court explained that, in drafting § 1603(b)(2), Congress "was aware of settled principles of corporate law and legislated within that context." *Id.*; *see also* H.R. Rep. No. 94-1487, at 15, 1976 U.S.C.C.A.N. at 6614.

Consistent with *Dole Food*, Powerex argued that BC Hydro's sole ownership interest in Powerex – held on behalf of the Province as its statutory agent – was sufficient to satisfy § 1603(b)(2). Under Provincial statutory law, BC Hydro indisputably "is for all its purposes an

agent of the government and its powers may be exercised *only* as an agent of the government." Hydro Act § 3(1) (Pet. App. 154a) (emphasis added). As the British Columbia Court of Appeals has recognized, "[s]ince its establishment BC Hydro has been an agent of the Crown in right of the Province." *Westbank First Nation v. British Columbia Hydro & Power Auth.*, [1997] 154 D.L.R. (4th) 93, *aff'd*, [1999] 4 C.N.L.R. 277. As such, Canadian courts treat all property owned by BC Hydro as owned by the Province. *See id.* at 98 (holding that property of BC Hydro is held as "the interest of the Crown in right of British Columbia and immune from taxation"). There is no logical basis for treating BC Hydro's 100% share interest in Powerex any differently from the other property BC Hydro owns on behalf of the Province.

As the Province's *agent*, BC Hydro had power to bind the Province as principal, as well as the authority to act at the Province's direction. *See Restatement (Second) of Agency* § 7 (1958) ("Authority is the power of the agent to affect the legal relations of the principal"). BC Hydro's ownership of Powerex's shares thus is legally imputed to the Province. *See id.* §§ 1, 7-8 (agent acts for the principal when performing with actual or apparent authority); *see also In re Focus Media Inc.*, 387 F.3d 1077, 1082 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 1674 (2005); *Mutual Life Ins. Co. v. Mooreman*, 366 F.2d 686, 689 (9th Cir. 1966).

The Ninth Circuit failed in *NRG Energy* directly to address that argument and instead flatly concluded that, under *Dole Food*, "unless the foreign government itself actually owns the shares, the entity does not meet the definition of a foreign state." Pet. App. 48a. The court thus viewed *Dole Food* as precluding sovereign status under § 1603(b)(2) from ownership by a foreign government through an agent created by statute. That holding, however, failed to recognize that *Dole Food* addressed an entirely different question: whether § 1603(b)(2) created a *categorical* exception to the customary rule of corporate law that a corporate parent owning shares of a subsidiary

does not have legal title to the assets of the subsidiary *for that reason alone*. *See* 538 U.S. at 474. This Court's decision in *Dole Food* begins by explaining the "basic tenet of American corporate law . . . that the corporation and its shareholders are distinct entities." *Id.* Under that rule, "[a] corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary." *Id.* at 475. Notwithstanding this Court's holding with respect to a "tiered" corporate structure (where a parent controls a subsidiary through an intermediate entity), *Dole Food* preserves the common law rule that the interests of two otherwise distinct corporations could be deemed a single enterprise for equitable purposes "on a case-by-case basis." *Id.*

Powerex below (and in *NRG Energy*) has invoked that "case-by-case" exception and has argued that BC Hydro, as the statutory agent of the Province, necessarily held all of the shares in Powerex on behalf of its principal, the Province. In failing to address that argument, the Ninth Circuit has imposed a standard that is illogical and contrary to this Court's interpretation of congressional intent in drafting § 1603(b)(2).

The consequences of that error are severe. The Ninth Circuit's decision sweeps all forms of beneficial ownership into *Dole Food*'s scope and disavows any role for common law principles that affect corporations in the analysis of governmental ownership under the FSIA. A rule that forecloses beneficial ownership under the FSIA strips governments of the flexibility that Congress legislated as essential to the dynamic and evolving needs of international trade and foreign relations. That result impermissibly alters this Court's precedent and should be rejected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 4, 2005

Counsel for Powerex Corp.

Supreme Court, U.S.
FILED
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No.

IN THE
Supreme Court of the United States

POWEREX CORP., A CANADIAN CORPORATION,
DBA POWEREX ENERGY CORP.,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA
EX REL. BILL LOCKYER,
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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November 4, 2005

TABLE OF CONTENTS

Page

Order of the United States Court of Appeals for the Ninth Circuit Dismissing Appeal, *California v. Powerex Corp.*, No. 05-16682 (Oct. 6, 2005) 1a

Order of the United States Court of Appeals for the Ninth Circuit, *California v. Powerex Corp.*, No. 05-16682 (Sept. 2, 2005) 2a

Order of the United States District Court for the Eastern District of California, *California v. Powerex Corp.*, No. 2:05-cv-143-GEB-PAN (Aug. 22, 2005) 4a

Powerex Corp.'s Request for Judicial Notice in Opposition to Motion To Remand, *California v. Powerex Corp.*, No. 2:05-cv-143-GEB-PAN (E.D. Cal. filed Mar. 7, 2005) (excerpt) 16a

Declaration of Kenneth G. Peterson (Aug. 9, 2002), attached as Exhibit 5 to Defendant Powerex Corp.'s Response to Plaintiffs' Motion To Remand and Motion To Strike and/or Sever Cross-Complaints, Nos. CV 02-0990-JM(LAB) *et al.* (S.D. Cal. filed Aug. 9, 2002) (excerpt) 19a

Deposition of Kenneth Grant Peterson (Aug. 21, 2002), attached as Exhibit 4 to Defendants' Supplemental Joint Notice of Lodgment in Support of Supplemental Opposition to Plaintiffs' Motion To Remand and Motion To Strike and/or Sever Cross-Complaints, Nos. CV 02-0990-RHW *et al.* (S.D. Cal. filed Sept. 4, 2002) (excerpt) 31a

Opinion of the United States Court of Appeals for the Ninth Circuit, *California v. NRG Energy Inc.*, Nos. 02-57200 *et al.* (Dec. 8, 2004) 33a

Treaty Between the United States of America and Canada Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, T.I.A.S. No. 5638, 15 U.S.T. 1555 ..... 50a

Treaty Between Canada and the United States of America Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D'Oreille River, Apr. 2, 1984, T.I.A.S. No. 11088, 1469 U.N.T.S. 309 ..... 126a

North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, done Dec. 17, 1992, 32 I.L.M. 289 (excerpt) 135a

Statutory Provisions Involved:

28 U.S.C. § 1441 ..... 137a
28 U.S.C. § 1442 ..... 140a
28 U.S.C. § 1603 ..... 141a
28 U.S.C. § 1605 ..... 142a

Constitution Act, 1867 (No. 5) (The British North America Act, 1867), 30 & 31 Vict., Ch. 3 (U.K.) (excerpt) 149a

British Columbia Hydro and Power Authority Act, [R.S.B.C. 1996], ch. 212 (excerpt) 151a

British Columbia Power for Jobs Development Act, [S.B.C. 1997], ch. 51 ..... 178a

Special Directive No. 4 to the British Columbia Hydro and Power Authority 189a

Special Direction No. 8 to the British Columbia Hydro and Power Authority 193a

Official Report of the Debates of the Legislative Assembly (Hansard), 34th Parliament, 2nd Session (June 27, 1988) (excerpt) 203a

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-16682

(D.C. No. CV-05-00143-GEB
Eastern California (Sacramento))

PEOPLE OF THE STATE OF CALIFORNIA
EX REL. BILL LOCKYER,
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Plaintiff-Appellee,

v.

POWEREX CORP., A CANADIAN CORPORATION,
DBA POWEREX ENERGY CORP.,
Defendant-Appellant.

[Oct. 6, 2005]

ORDER

Before: REINHARDT, RYMER, and HAWKINS, Circuit Judges.

We have reviewed the parties' responses to the court's September 2, 2005, order to show cause. We dismiss the appeal for lack of jurisdiction. *See* 28 U.S.C. § 1447(d); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995).

All pending motions are denied as moot.

DISMISSED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-16682

(D.C. No. CV-05-00143-GEB
Eastern California (Sacramento))

PEOPLE OF THE STATE OF CALIFORNIA
EX REL. BILL LOCKYER,
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Plaintiff-Appellee,

v.

POWEREX CORP., A CANADIAN CORPORATION,
DBA POWEREX ENERGY CORP.,
Defendant-Appellant.

[Sept. 2, 2005]

ORDER

Appellant has filed an emergency motion for stay of the district court's August 23, 2005, remand order pending appeal.

A review of the record suggests that this court may lack jurisdiction over the appeal because an order remanding a removed action to state court for lack of subject matter jurisdiction is not reviewable on appeal. See 28 U.S.C. § 1447(d); *Things Remembered v. Petrarca*, 516 U.S. 124, 127 (1995).

By September 7, 2005, appellant shall move for voluntary dismissal of the appeal or show cause why it should not be dismissed for lack of jurisdiction. Appellee's response to the emergency motion for stay pending appeal and this order to show cause is due September 12, 2005. The optional reply is due September 14, 2005. The parties

shall file the memoranda by close of business on the due date and may contact the court's Motions Unit at (415) 556-9890 to obtain the number to file the memoranda by facsimile.

If appellant does not comply with this order, the Clerk shall dismiss this appeal pursuant to Ninth Circuit Rule 42-1.

Briefing on the merits of the appeal is suspended pending further order of the court.

For the Court,

/s/ LESLEY HALE
Lesley Hale
Motions Attorney/Deputy Clerk
9th Cir. R. 27-7
General Orders/Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:05-cv-143-GEB-PAN

PEOPLE OF THE STATE OF CALIFORNIA
EX REL. BILL LOCKYER,
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Plaintiff,

v.

POWEREX CORP., A CANADIAN CORPORATION,
DBA POWEREX ENERGY CORP., AND DOES 1 - 100,
Defendants.

ORDER

Plaintiff moves to remand this action to Sacramento County Superior Court. Defendant Powerex Corp. opposes the motion, contending that federal question removal jurisdiction exists. Further, Defendant moves to dismiss Plaintiff's complaint under Federal Rule of Civil Procedure 12(b)(6). Plaintiff opposes this dismissal motion.

BACKGROUND

The California energy crisis of 2000-2001 provides the backdrop to this litigation. From 1998 to the present, Defendant, a Canadian corporation, has conducted electricity transactions in the California markets. (Compl. ¶¶ 4, 43.) Plaintiff alleges that from 1999 through 2001, Defendant engaged "in a number of unlawful, unfair, fraudulent, and manipulative trading schemes to the detriment of the People of the State of California," in violation of California's Unfair Competition Law (Cal. Bus. & Prof. Code § 17200, et seq.) ("UCL") and the California Commodity Law of 1990 (Cal. Corp. Code § 29500, et seq.). (Compl. ¶¶ 1, 19, 44.) Plaintiff's complaint seeks an injunction,

restitution, disgorgement, damages, civil penalties, and other equitable relief. (*Id.* ¶ 2.)

DISCUSSION

Motion to Remand

Plaintiff argues this action must be remanded to state court because there is no federal question removal jurisdiction. Plaintiff contends its complaint "is a law enforcement action brought against Powerex to enforce California's antifraud and consumer protection laws. . . ." (Pl.'s Mot. to Remand at 2.) Further, Plaintiff contends that "the Attorney General's case solely addresses the fraudulent market manipulation and gaming strategies employed by Powerex which adversely impacted the citizens of California." (*Id.*) Plaintiff further contends that "Powerex['s] removal [cannot be] based on the Foreign Sovereign Immunity Act" and that "compelling the Attorney General to move its state-law related case to federal court would violate the Eleventh Amendment's provision protecting a state's sovereign immunity." (*Id.* at 13-14.)

Defendant counters that removal was proper for two independent reasons: (1) there is federal question jurisdiction under the Federal Power Act, 16 U.S.C. § 825p ("FPA"), and (2) Defendant's "foreign state" status as defined by the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603 et seq. ("FSIA"). Defendant contends federal question removal jurisdiction exists since "[t]he Attorney General's claims arise under federal law because he alleges misconduct in wholesale power transactions, which are exclusively the province of federal law, and implicate specific federal tariffs governing the transactions at issue." (Def.'s Opp'n to Pl.'s Mot. at 13.) Defendant also contends it was "entitled to remove this action because it satisfies the statutory criteria of a foreign state codified in [FSIA since] it is both an agent and instrumentality of the Province of British Columbia and . . . is also a wholly owned subdivision of the Province's statutory agent BC Hydro." (*Id.* at 2.)

A. Standard

An action filed in state court can be removed to federal court if it "originally could have been filed in federal court." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *see also* 28 U.S.C. § 1441(b) ("Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.") Defendant bears the burden of establishing federal jurisdiction, "and the removal statute is strictly construed against removal jurisdiction." *Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d 1261, 1265 (9th Cir. 1999).

"The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. . . . The rule makes the plaintiff the master of the claim; [it] may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).

B. Federal Question Jurisdiction Under the Federal Power Act

Plaintiff argues this action must be remanded because "[t]he Attorney General's well-pleaded Complaint solely asserts state causes of action based on California's consumer protection and commodities laws [that] protect California citizens from fraud and deceit." (Pl.'s Mot. to Remand at 13.) Plaintiff argues:

> In particular, the Attorney General's Complaint alleges that Powerex's market manipulation and gaming strategies constituted "unfair" and "fraudulent" business practices pursuant to California Business and Professions Code § 17200 (Complaint, ¶¶ 64, 65), and that Powerex's market manipulation and gaming strategies constituted "unlawful" business practices within the meaning of § 17200 "because they violate California law, including but not limited

> to California Corporations Code § 29536." (Complaint ¶ 66). Additionally, the Complaint alleges that Powerex's market manipulation and gaming strategies violated the California Commodity Law because they involved willful and fraudulent acts involving offers to sell, sales, offers to purchase, and purchases of commodities and commodity options.
>
> * * *
>
> [B]ecause the Complaint does not rely on any federal law to create the causes of action or to seek relief, it is clear that the Attorney General's well-pleaded Complaint does not present a federal question. Thus, removal is improper based on the face of the Complaint.

(*Id.* at 5-6.)

Defendant rejoins that Plaintiff cannot rely on the well-pleaded complaint rule since Plaintiff's complaint is "artfully pled" to avoid federal jurisdiction. Defendant contends "the Attorney General's state law claims necessarily implicate substantial disputed questions concerning the FPA [and] the Attorney General's state law claims are completely preempted by the FPA." (Def.'s Opp'n to Pl.'s Mot. at 13.) Plaintiff counters that "courts have long recognized that there is no complete pre-emption under the FPA" and "Powerex has failed to demonstrate that the Attorney General's Consumer Protection Action is an 'artfully pleaded federal cause of action." (Pl.'s Reply at 4, 9.)

The artful pleading doctrine applies to a situation "where a plaintiff articulates an inherently federal claim in state-law terms." *Brennan v. S.W. Airlines Co.*, 134 F.3d 1405, 1409 (9th Cir. 1998). "The . . . doctrine allows courts to delve beyond the face of the state court complaint and find federal question jurisdiction by recharacteriz[ing] a plaintiff's state-law claim as a federal claim." *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1041 (9th Cir. 2003) (internal quotation marks and citations omitted). "Whether the [doctrine] applies requires an analysis of whether plaintiff['s]claims 'arise

under' federal law." *In re Cal. Retail Natural Gas & Elec. Antitrust Litig.*, 170 F. Supp. 2d 1052, 1056 (D. Nev. 2001). "[C]ourts have used the . . . doctrine in: (1) complete preemption cases, and (2) substantial federal question cases. Subsumed within this second category are those cases where the claim is necessarily federal in character, or where the right to relief depends on the resolution of a substantial, disputed federal question." *Lippitt*, 340 F.3d at 1041-42 (internal citations omitted).

A state law claim is completely preempted if federal law "provide[s] the exclusive cause of action for the claim asserted and also set[s] forth procedures and remedies governing that cause of action." *Id.* at 1042 (citing *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003)). Complete preemption is rare; the Supreme Court has only found complete preemption in three categories of cases: certain causes of action under the Labor Management Relations Act, the Employee Retirement Income Security Act, and the National Banking Act. *Beneficial Nat'l Bank*, 539 U.S. at 8.

"[T]he artful pleading doctrine [also] allows federal courts to [exercise] jurisdiction over state law claims that implicate a substantial federal question." *Lippitt*, 340 F.3d at 1042. "[A] case is 'necessarily federal' when it falls within the express terms of a statute granting federal courts exclusive jurisdiction over the subject matter of the claim." *Hendricks v. Dynegy Power Mtkg., Inc.*,160 F. Supp. 2d 1155, 1161 (S.D. Cal. 2001). Further, "[e]ven where . . . state law creates the cause of action, . . . federal jurisdiction may still lie if 'it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims.'" *Arco Envtl. Remediation, LLC v. Dep't of Health & Envtl. Quality*, 213 F.3d 1108, 1114 (9th Cir. 2000) (citing *Rains v. Criterion Sys., Inc.*, 80 F.3d 339, 345 (9th Cir. 1996)).

The Ninth Circuit cautions that the artful pleading doctrine "should [be] invoke[d] only in limited circumstances as it raises difficult issues of state and federal relation-

ships and often yields unsatisfactory results. While the artful pleading doctrine is a useful procedural sieve to detect traces of federal subject matter jurisdiction in a particular case, it also has substantive implications on the scope of federal jurisdiction and efficiency." *Lippitt*, 340 F.3d at 1041 (internal quotation marks and citations omitted).

1. Complete Preemption

Defendant argues "the FPA completely preempts the Attorney General's purported state law claims," contending that "[t]he FPA creates an exclusive federal scheme for the regulation of wholesale electric power transactions, preempting state regulation." (Def.'s Opp'n at 21-22.) Plaintiff counters that "courts have long recognized that there is no complete pre-emption under the FPA." (Pl.'s Reply at 3, 4.)

The FPA does not completely preempt Plaintiff's state law claims since the claims do not seek to enforce any "liability or duty created by" the FPA. *See Hendricks*, 160 F. Supp. 2d at 1160; *Calif. ex rel Lockyer v. Mirant Corp.*, 2002 WL 1897669, at *6 (N.D. Cal. Aug. 6, 2001); *In re Cal. Retail Natural Gas & Elec. Antitrust Litig.*,170 F. Supp. 2d 1052 (D. Nev. 2001); *Indeck Maine Energy, LLC v. ISO New England, Inc.*, 167 F. Supp. 2d 675, 687 (D. Del. 2001). The FPA preempts only those claims that fall within the FPA's exclusive jurisdictional provision. This exclusive jurisdictional provision provides that the federal courts "shall have exclusive jurisdiction of violations of [the FPA] or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, [the FPA] or any rule, regulation, or order thereunder." 16 U.S.C. § 825p.

2. Substantial Federal Question

Defendant also contends that Plaintiff's removal was proper because Plaintiff's "state law claims necessarily implicate substantial disputed questions concerning the FPA." (Def.'s Opp'n at13.) Defendant argues that Plain-

tiff's claims arise under federal law because they "cannot be judged without consideration of the . . . tariffs [filed with the Federal Energy Regulatory Commission ("FERC")]." (*Id.* at 17.) Defendant contends Plaintiff's complaint was artfully pled in the guise of state claims "to avoid [alleging] explicit claims of violations of the ISO and the PX tariffs," since Plaintiff recognizes that "no court – state or federal – could determine whether Powerex's conduct was 'unlawful, unfair or fraudulent' without resort to the tariffs." (*Id.*) Defendant argues that Plaintiff's claims arise under federal law because Plaintiff alleges misconduct in wholesale power transactions, which are exclusively the province of federal law, and implicate specific federal tariffs governing the transactions at issue.

Plaintiff counters that the artful pleading doctrine does not apply because "The Complaint does not seek to enforce any federal obligations that Powerex might have violated." (Pl.'s Reply at 6.) Plaintiff argues that "any allusions to federally-regulated entities like the ISO and PX, that were made in order to provide the context for the gaming allegations, do not change the state causes of action into federal ones." (*Id.* at 7.) Moreover, Plaintiff argues that "the Attorney General does not seek to enforce or challenge Powerex's agreements with the ISO or its obligations under the MMIP. Resolution of any issues regarding federal tariffs is not necessary to resolve the state law claims." (*Id.*)

Thus, the issue is "whether [Plaintiff] has artfully phrased a federal claim by dressing it in state law attire." *Lippitt*, 340 F.3d at 1041. "A careful reading of artful pleading cases shows that no specific recipe exists for a court to alchemize a state claim into a federal claim – a court must look at a complex group of factors in any particular case to decide whether a state claim actually 'arises' under federal law." *Id.* at 1042-43.

Defendant contends that *California ex rel. Lockyer v. Dynegy*, 375 F.3d 831 (9th Cir. 2004) ("*Dynegy*"), mandates denial of Plaintiff's motion, arguing that the

Attorney General unsuccessfully argued in *Dynegy*, as he does here, "that the core of his allegations was not that defendants expressly violated the FPA, but that they 'engaged in a pattern of fraudulent and unfair' behavior in furtherance of their scheme to manipulate California energy prices." (Def.'s Opp'n at 18 (citing *Dynegy*, 375 F.3d at 841).) Defendant contends that "Here, as in *Dynegy*, the Attorney General lacks an independent state law basis for its Unfair Competition Law claim because 'California's state claim represented a naked attempt to enforce these federal obligations.'" (Def.'s Opp'n at 19 (citing *Dynegy*, 375 F.3d at 843).) Defendant also contends that "Even if some of the matters alleged in the Attorney General's Complaint do not fall within the exclusive jurisdiction provision of the FPA, the allegations regarding ancillary services – which repeat the Attorney General's allegations in *Dynegy* – certainly do [and] [t]hose allegations alone justify removal." (Def.'s Opp'n at 19.)

Plaintiff counters, arguing *Dynegy* is distinguishable:

> In *Dynegy*, the state's lawsuit was expressly based on the defendants' violation of the ISO tariff . . . . Thus, the cause of action was deemed necessarily federal in character. . . . Here, the Attorney General does not assert violations of the ISO tariff. The allegation that Powerex fraudulently offered to sell ancillary services is asserted as one of the various gaming strategies and fraudulent market manipulation schemes employed by Powerex to deceive California consumers. Moreover, not only does the Complaint fail to allege the ISO tariff, but the issue of whether Powerex violated the ISO tariff agreement would not resolve whether anti-competitive conduct occurred under state law.

(Pl.'s Reply at 8.)

The Ninth Circuit found in *Dynegy* that the "relief [sought was] 'predicated on a subject matter committed exclusively to federal jurisdiction.' The state lawsuit turn[ed], entirely, upon the defendant's compliance with a

federal regulation. The tariff define[d] the companies' contractual obligation with respect to the conduct at issue. Absent a violation of the FERC-filed tariff, no state law liability could survive." *Dynegy*, 375 F.3d at 841. The Court further stated that "The very face of California's complaint betrays that the gravamen of the complaint is the companies' alleged violations of federal tariff obligations. It repeatedly cites the federal tariff and alleges that the companies violated the agreement embodied within it." *Id.* at 841 n.6. The claim for unlawfulness in *Dynegy* was "based entirely on alleged tariff obligations (i) to hold ancillary services capacity in reserve prior to receipt of an ISO dispatch instruction and (ii) to comply with ISO's dispatch instructions. The federal tariff wholly govern[ed] the lawfulness of the companies' conduct. Similarly, with respect to the 'unfair' and 'fraudulent' terms, the claims depend[ed] entirely upon the federal tariff." *Id.*

Plaintiff's reference to a federal tariff in its complaint in the instant case is unlike the reference in *Dynegy* because Plaintiff's claims do not seek to enforce any federal law duty or liability; rather, Plaintiff seeks only to enforce state law duties and liabilities. *See id.*; Compl. ¶ 66. Therefore, this case is distinguishable from *Dynegy* since in *Dynegy*, "[t]he state lawsuit turn[ed], entirely, upon the defendant's compliance with a . . . FERC-filed tariff. . . ." *Id.* at 841. Thus, in *Dynegy*, "the reference to and necessity of relying upon federal law [was] unavoidable." *Id.* at 841 n.7 (distinguishing *Lippitt*).

Lippitt concerned allegations analogous to those alleged in Plaintiff's complaint. The Ninth Circuit held in *Lippitt* that since the plaintiff's complaint alleged fraud and deceptive advertising practices, rather than any violation of federal regulations, there was no need for inquiry about federal law because Lippitt "merely . . . allege[d] that Defendants' conduct was either unfair or fraudulent" and did not allege that the conduct was "unlawful" under federal law. *Lippitt*, 340 F.3d at 1043.

"*Lippitt* involved a private attorney general's lawsuit under Cal. Bus. & Prof. Code § 17200 et seq. ("UCL") against several brokerage firms for sales and marketing practices associated with certain investment product." *Dynegy*, 375 F.3d at 841 n.7. In the instant case, as in *Lippitt*,

> Federal law is not a necessary element of [Plaintiff]'s UCL claim. To bring a UCL claim, a plaintiff must show either an (1) unlawful, unfair, or fraudulent business act or practice, or (2) unfair, deceptive, untrue or misleading advertising. Because . . . section 17200 is written in the disjunctive, it establishes three varieties of unfair competition-acts or practices which are unlawful, or unfair, or fraudulent. [A] practice is prohibited as "unfair" or "deceptive" even if not "unlawful" or vice versa. Therefore, [Plaintiff] does not have to rely on a violation of [the FPA or any federal tariffs] to bring a UCL claim in California state court. [Plaintiff]merely has to allege that Defendant['s] conduct was either unfair or fraudulent.

Lippitt, 340 F.3d at 1043.

Plaintiff's "allegations are sufficient to sustain the elements of [its] § 17200 claim without resort to federal law," since Plaintiff "makes no effort to enforce [any federal rights or obligations]. Rather, [Plaintiff] seeks to use . . . state statute[s], namely California's Unfair Competition Law [and the California Commodity Law], as . . . vehicle[s] to hold Defendant[] liable for [market manipulation and gaming strategies]." *Id.* Whether Plaintiff's alleged activities underlying these state claims also violated the FPA or a federal tariff is irrelevant since Plaintiff, as master of its complaint, chose to allege that Defendant engaged in conduct that was unlawful under state law, instead of alleging violations of federal law. *Caterpillar Inc.*, 482 U.S. at 392. "That the specific goal of protecting California customers from dishonest business practices . . . may comport with the broader . . . goals of the [FPA] is

not enough to sweep [Plaintiff]'s complaint within the exclusive jurisdictional ambit of [16 U.S.C. § 825p]." *Lippitt*, 340 F.3d at 1043-44.

Since Plaintiff's complaint does not seek to enforce any "liability or duty" created by the FPA, and Plaintiff alleges it can show that Defendant violated the alleged California claims without reliance upon federal law, Plaintiff's complaint was not artfully pled and Defendant lacked federal removal jurisdiction under the FPA.

C. Federal Question Jurisdiction Under the Federal Sovereign Immunity Act

Defendant also contends removal was appropriate since it is a foreign sovereign entitled to remove this action under FSIA. Under 28 U.S.C. § 1441(d), an action against a foreign state may be removed. A "foreign state" includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state. 28 U.S.C. § 1603(a). An "agency or instrumentality of a foreign state" means any entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States nor created under the laws of any third country." *Id.* § 1603(b). In *California v. NRG Energy, Inc.*, the Ninth Circuit held that Powerex is "not a foreign instrumentality under FSIA." 391 F.3d 1011, 1026 (9th Cir. 2004).

But Defendant argues that *NRG Energy* is distinguishable because in *NRG Energy*, Powerex was not then a wholly owned subdivision of a province of Canada, and Powerex now is a wholly owned subdivision of the Province of British Columbia's statutory agent BC Hydro. Thus, Defendant argues it is a foreign state for purposes of FSIA. However, "only a direct ownership of a majority of shares by the foreign state satisfies the statutory requirement [of FSIA]." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). Although Powerex is owned by BC

Hydro and BC Hydro is an agent of the Province, the Province does not itself own a majority of the shares of Powerex. Therefore, Powerex is not a foreign state for purposes of FSIA.

Since federal removal jurisdiction is lacking, Plaintiff's remand motion is granted.[1] Therefore, this action is remanded to Sacramento County Superior Court.

IT IS SO ORDERED.

Dated: August 22, 2005

/s/ GARLAND E. BURRELL, JR.
GARLAND E. BURRELL, JR.
United States District Judge

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[1] Because of this ruling, neither Plaintiff's Eleventh Amendment argument nor Defendant's motion to dismiss need be addressed.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Case No. 2:05-CV-00143-GEB-PAN

PEOPLE OF THE STATE OF CALIFORNIA
EX REL. BILL LOCKYER,
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Plaintiff,

v.

POWEREX CORP., A CANADIAN CORPORATION,
DBA POWEREX ENERGY CORP., AND DOES 1 - 100,
Defendants.

POWEREX CORP.'S REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO MOTION TO REMAND

Pursuant to Federal Rule of Evidence 201, Defendant Powerex Corp. ("Powerex") requests that the Court take judicial notice of the information contained in the following exhibits attached:

* * * * *

Powerex requests that the Court take judicial notice of the following documents, which are true and accurate copies of materials contained in the certified record on appeal in *California v. NRG Energy*, No. 02-57200 filed with the United States Court of Appeals for the Ninth Circuit on February 11, 2003:[4]

[4] These documents are proved up by the Declaration of Andrew M. Edison in Support of Powerex Corp.'s Request for Judicial Notice in Opposition to Motion to Remand. *See also U.S. v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (holding that a court may take judicial notice of the records of (1) any court of this state, or (2) any court of record of the United States or of any state of the United States); *DeMarco v. DepoTech Corp.*, 149 F. Supp. 2d 1212, 1218-19 (S.D. Cal.

8. Declaration of Kenneth G. Peterson.
9. Entitlement Assignment Agreement Between the Province of British Columbia and Powerex Regarding the Columbia River.
10. Skagit River Agreement Between the Province of British Columbia and the City of Seattle.
11. Agreement for the Transmission of Skagit Treaty Power Between the Province of British Columbia Hydro and Power Authority and the City of Seattle.
12. Assignment Agreement between BC Hydro and Powerex Regarding the Skagit River Agreement.
13. Orders in Council of the Province of British Columbia Nos. 847/2001 (dated September 25, 2001) and 751/2001 (dated August 9, 2001).
14. Extract from the Minutes of a Meeting of the Board of Directors of British Columbia Hydro and Power Authority held on October 18, 2001.
15. British Columbia Hydro and Power Act, R.S.B.C. 1996, Ch. 212, Columbia Basin Trust, R.S.B.C. 1996, Ch. 53.
16. British Columbia Power for Jobs Development Act, S.B.C. 1997, Ch. 51.
17. Special Direction No. 8 to the British Columbia Utilities Commission.
18. Special Directive No. 4 to the British Columbia Hydro and Power Authority.
19. Excerpt from BC Hydro's 2002 Annual Report.
20. Printout from Powerex's Website discussing Canadian Entitlement Power.
21. Declaration of Valerie Lambert in Support of British Columbia Hydro and Power Authority's Motion To Dismiss.

2001) (taking judicial notice of Notice of Compliance issued by a Canadian regulatory agency).

22. Excerpt from the Deposition Transcript of Valerie C. Lambert, August 27, 2002, pages 1-36.
23. Excerpt from the Deposition Kenneth G. Peterson, August 21, 2001, volume 1, pages 1-97.
24. Excerpt from the Deposition Transcript of Kenneth G. Peterson, August 22, 2002, volume 2, pages 114-186.
25. Letter from the Honorable Jack Davis, Minister, Province of British Columbia to L.I. Bail, Chairman and CEO of BC Hydro, dated November 4, 1988.
26. Deposition Transcript of Kenneth Grant Peterson, August 21, 2002, volume 1, pages 1-113.
27. Revised Minutes of the Meeting of the Risk Management Committee, August 3, 2000.

* * * * *

Dated: March 7, 2005

[Counsel name/address block omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Coordination Proceeding Special Title (Rule 1550(b))

Nos. CV 02-0990-JM(LAB)
CV 02-1000-L(JAH)
CV 02-1001-B(POR)

WHOLESALE ELECTRICITY ANTITRUST CASES I & II

This Document relates To:

Reliant Energy Services, Inc., et al. v. Arizona Electric Power Cooperative, Inc., et al.

Duke Energy Trading and Marketing, LLC, et al. v. Arizona Public Service Company, et al.

Reliant Energy Services, Inc., et al. v. Arizona Electric Power Cooperative, Inc., et al.

DECLARATION OF KENNETH G. PETERSON

I, Kenneth G. Peterson, declare as follows:

1. I have personal knowledge of the facts contained in this Declaration, except for those matters stated on information and belief, as to which I believe them to be true. If called as a witness, I could and would competently testify to all of the facts stated herein.

2. I have held the position of President and Chief Executive Officer of Powerex Corporation ("Powerex") since December 1, 1994.

3. I am trained as a resource economist and hold a masters degree in economics. Prior to joining Powerex, I was employed for 14 years with the British Columbia Hydro and Power Authority ("BC Hydro"). During my career at BC Hydro, I was responsible for various aspects of resource planning and, in that capacity, developed an inti-

mate knowledge of BC Hydro's generating resources, the evolution of domestic demand for electricity within BC Hydro's service area in British Columbia, and the potential for the export of electricity to interconnected jurisdictions, particularly in the United States. I had personal responsibility for overseeing the preparation of both resource plans and demand forecasts during my tenure at BC Hydro. When I began my career at BC Hydro, the corporation was in the latter stages of a very significant expansion of its generating capacity through the construction of major hydroelectric facilities in British Columbia. My understanding of the genesis of that construction program and its subsequent evolution is set out in the following paragraphs.

4. In 1962, the Provincial Government passed the British Columbia Hydro and Power Authority Act to establish a vehicle in which to hold assets it had acquired and to promote major hydroelectric development involving the construction of significant storage dams and generating capacity on the Peace and Columbia River systems (the "Two River Policy"). The Act was subject to litigation and ultimately declared ultra vires by the British Columbia Supreme Court in 1963. In 1964 the Provincial Government passed another British Columbia Hydro and Power Authority Act, which created the Provincial Crown Corporation known today as BC Hydro.

5. Once created, BC Hydro implemented the Two River Policy. Specifically, it began planning for the development of the W.A.C. Bennett Dam to create the Williston Reservoir on the Peace River. The Dam was completed in 1967. Since 1968, BC Hydro has further developed the hydroelectric potential of the Peace River with the installation of the Peace Canyon Dam and other power-related facilities.

6. In connection with the Two River Policy and its development of the Columbia River system, BC Hydro joined the Provincial Government and the Canadian Government in negotiations with the United States between

1962 and 1964 to develop a Protocol to the Columbia River Treaty ("Treaty").

7. The formal documents that comprise the arrangements between Canada and the United States with respect to the Treaty are compiled in a book issued by the Canadian Departments of External Affairs and Northern Affairs and National Resources and published by the Queen's Printer and Controller of Stationery in February 1964. In April 1964, the Department of External Affairs issued a further volume explaining additional aspects of the process that led to the finalization of the Treaty and the Protocol. My review of these documents, together with my involvement with the Treaty in the context of my responsibilities at BC Hydro and later at Powerex, has informed my understanding of these historical events.

8. Attached as Exhibit A hereto is a true copy of the following pages from the book described in Paragraph 8: 58-81 (Columbia River Treaty); 82-90 (the formal press release issued by the Prime Minister of Canada on January 17, 1961, immediately after signing the Treaty, explaining its origin and effect); 100-106 (Canada-British Columbia Agreement dated July 8, 1963); 107-109 (Canada-British Columbia Agreement dated January 13, 1964); 110-114 (exchange of Notes and Protocol regarding the Columbia River Treaty); 115-121 (exchange of Notes and Attachment Relating to Terms of Sale).

9. The Treaty required Canada to construct storage facilities in Canada to control the flow of the Columbia River in a way that would enable the United States to generate more power at its existing facilities on the Columbia River (the "Downstream Benefits"), and entitled Canada to receive half of the Downstream Benefits over the 60-year life of the Treaty (the "Canadian Entitlement"). In 1963, the British Columbia Provincial Government negotiated an agreement with Canada that provided for British Columbia to directly receive the Downstream Benefits. This Agreement is found at pages 100-106 of Exhibit A.

10. In 1964, the Province, Canada, and the United States agreed to a Protocol for the implementation of the Treaty. The Protocol is found at pages 110-114 of Exhibit A. In two separate documents, it was agreed that British Columbia would receive an upfront payment in place of the first 30 years of the Canadian Entitlement. These two documents are found at pages 107-109 and 115-121 of Exhibit A.

11. In October 1964 BC Hydro prepared a booklet that consolidated for convenient reference a number of documents relating to the Treaty. Attached as Exhibit B hereto is a true copy of the following pages from the book described in Paragraph 11: 1; 39-45 (Canadian Entitlement Purchase Agreement); 47 (Designation of Canadian Entity); and 49-54 (Exchange of Notes).

12. In September 1964, Canada designated BC Hydro as the Canadian Entity under the Treaty. This Designation is found at page 47 of Exhibit B.

13. BC Hydro played a key role, through its then Chairman Hugh Keenlyside, in the negotiations that produced these important international and interprovincial agreements. As a result, BC Hydro was responsible for construction of the reservoir facilities on the Columbia River to fulfill Canada's obligations under the Treaty and has been responsible ever since for the ongoing implementation and administration of the Treaty. The arrangements made for the initial disposal are found in the Canadian Entitlement Purchase Agreement (the "CEPA") between BC Hydro and Columbia Storage Power Exchange, a non-profit corporation organized under the laws of the State of Washington. Mr. Keenlyside signed this document on behalf of BC Hydro and it was approved by an Exchange of Notes dated September 16, 1964, between Canada and the United States. True copies of the CEPA and the Exchange of Notes are found at pages 39-45 and 49-54 of Exhibit B.

14. During the negotiations related to the Columbia River Treaty, BC Hydro continued its parallel development of the Peace River pursuant to the Two River Policy.

15. Construction of the facilities contemplated by the Two River Policy were completed in 1984 with the completion of the Revelstoke Dam on the Columbia River.

16. During the 1980s, BC Hydro was an active seller of power to the United States entities, primarily the Bonneville Power Administration ("Bonneville"), with such sales taking place at the international border.

17. In the late 1980's, the Provincial Government overhauled the legislation governing the energy sector in British Columbia. The Provincial Government created Powerex as an export agency for the purpose of marketing power to United States entities. The Provincial Government wished to ensure that BC Hydro's surplus power was marketed in a manner that maximized the benefits to all British Columbians. Additionally, the Provincial Government wished to promote the development of electricity produced by independent power producers for sales to the United States market.

18. In December 1988, BC Hydro – acting as the agent of the British Columbia Provincial Government under § 3(1) of the Hydro Act – incorporated Powerex under the Company Act of British Columbia as a wholly owned subsidiary of BC Hydro to serve the vital role of marketing the Province's surplus electric power. Powerex was originally incorporated as the British Columbia Power Export Corporation on December 13, 1988. The company changed its name to British Columbia Power Exchange Corporation on February 15, 1991, and then changed its name again to Powerex Corp. on September 6, 2000. True and correct copies of the Articles of Incorporation and Certificates changing the name of the company are attached hereto as Exhibit C.

19. Following its incorporation in 1988, Powerex assumed its responsibility for marketing surplus power from the BC Hydro system. BC Hydro delivered surplus elec-

tricity to Powerex at the British Columbia border and Powerex, in turn, sold it to entities from the United States and Alberta at wholesale. Powerex continues to perform this function within this structure to the present day.

20. Since its incorporation, Powerex has also been called upon to serve some specific policy objectives set for it by the Provincial Government. For instance, in the early 1990's the Provincial Government approved Powerex as the appropriate vehicle to create a power exchange operation ("PEO") in British Columbia. The Provincial Government desired to promote a domestic independent power production industry by creating an efficient market for the private power. The PEO was approved as operational as of September 1993. The PEO contemplated Powerex making an auction market for the trading of electricity. The objectives for Powerex were set out in a document prepared by Powerex entitled "Opportunities in the Short-Term Electricity Market," which formed the basis for a presentation to stakeholders in early 1991 as part of the application process associated with the approval of the PEO. True copies of the relevant portions of this document are attached hereto as Exhibit D.

21. The PEO was part of the means by which Powerex was to meet the objectives of the Province. The PEO remained in place for a number of years, but did not fulfill expectations because of lack of interest from the generating sector. The PEO is no longer operational.

22. Powerex was directly involved with the realization of Provincial objectives in connection with the Columbia River Treaty commencing early in the 1990s. It was at that time that the Province began the process of determining how to receive or dispose of the Canadian Entitlement under the Treaty once their contracts for the sale of the Downstream Benefits began to expire in 1998. Under the Treaty, the United States would be obliged to return the Canadian Entitlement to Canada unless a resale could be negotiated and approved by both countries.

23. Commencing in early 1990, BC Hydro began discussions with the U.S. Army Corps of Engineers and Bonneville (collectively the U.S. Entity under the Treaty) to define the Canadian Entitlement. Discussions became more focused commencing in 1993 as representatives of the Province, BC Hydro, Bonneville, and the U.S. Army Corps of Engineers began meetings to address the issue.

24. Early on, the potential for resale of the Canadian Entitlement in the United States became a prominent part of the discussions. Mr. Ken Epp, then President of Powerex, was an early member of the negotiating team, along with the Deputy Minister of Energy, Petroleum Mines and Mineral Resources. Upon the retirement of Mr. Epp, I became President and CEO of Powerex. I was also a member of the Province's negotiating team. I remained in both capacities through the completion of the negotiating process that resulted in arrangements with the United States for the return and/or resale of the Canadian Entitlement effective April 1, 1999. The negotiation process with respect to the Canadian Entitlement took approximately seven years. While the negotiating team on the Canadian side varied from time to time, I was a part of it throughout the process. The final arrangements approved by both countries include a significant role for Powerex.

25. Pursuant to an Entitlement Assignment Agreement, the Province assigned all of its rights, title, and interests in the Entitlement to Powerex so that it can realize the maximum benefits of the surplus power for British Columbians. While the precise amount of the Canadian Entitlement is determined pursuant to very complex calculations, it is a very significant resource. A true copy of the Entitlement Assignment Agreement is attached hereto as Exhibit E.

26. In 1997, the Province passed the Power for Jobs Act ("Jobs Act"). The Jobs Act contemplates diverting portions of BC Hydro's surplus power or the Canadian Entitlement, which would otherwise be sold by Powerex to ex-

ternal markets, to British Columbia industry for the purpose of job creation. Pursuant to the Jobs Act, the Provincial Government was empowered to instruct either BC Hydro or Powerex to supply power to British Columbia industry on terms defined by the Provincial Government.

27. On behalf of Powerex, I have been involved in numerous negotiations between the Provincial Government and industrial undertakings contemplating locating facilities in British Columbia for which the price of power is a significant factor in making a location decision. Powerex was contemplated to play an important role in connection with the supply of power in each case. While those efforts have been unsuccessful, pursuant to the Jobs Act and at the direction of the Provincial Government, Powerex has supplied power on favorable terms to facilitate the expansion of some existing businesses in British Columbia.

28. On March 30, 1984, the Provincial Government entered into an agreement with the City of Seattle, Washington ("Seattle"), related to the Skagit River Treaty (the "Skagit Agreement"). Under the Skagit Agreement, Seattle agreed not to raise the High Ross Dam, which would have had the effect of flooding substantial areas of British Columbia. As compensation for the loss of the power benefits that would have been derived from the High Ross Dam, British Columbia agreed to deliver certain quantities of electricity to Seattle until 2066. A true copy of the Skagit Agreement is attached hereto as Exhibit F.

29. On December 3, 1985, the Province assigned certain of the Province's benefits and obligations under the Skagit Agreement to BC Hydro. A true copy of this document is attached hereto as Exhibit G. As a result of a 1996 Bonneville rate case, lengthy negotiations commenced between the Province, Seattle, and Bonneville regarding the transmission arrangements relating to the power provider under the Skagit River Treaty. Powerex took the lead role (on behalf of the Province) in negotiating a resolution of the issues among the parties. Effective February 1, 1999, BC Hydro entered into the "Agreement

for the Transmission of Skagit River Treaty Power between British Columbia Hydro and Power Authority and the City of Seattle" (the "Skagit Transmission Agreement"). A true copy of the Skagit Transmission Agreement is attached hereto as Exhibit H. Powerex executed a replacement power agreement with Bonneville, also effective February 1, 1999, under which Seattle was able to call upon Bonneville to deliver power to Seattle for the account of Powerex in the event Powerex was unable to deliver the Skagit River Treaty power pursuant to the Skagit Agreement. Additionally, Seattle and Bonneville executed a Point-to-Point Transmission Service Agreement ("Skagit PTP Agreement") for the necessary transmission capacity for the provision of the Skagit Treaty power. BC Hydro assigned its rights and obligations, and delegated its operating responsibilities under the Skagit Transmission Agreement and the Skagit PTP Agreement to Powerex, to the extent permitted by such agreements. A true copy of the BC Hydro – Powerex Assignment Agreement is attached hereto as Exhibit I.

30. Columbia Power Corporation ("CPC") and CBT Power Corp. ("CBT") were established by Columbia Basin Trust, a corporation established by Columbia Basin Trust Act. CPC and CBT were responsible for upgrading the Brilliant generating facilities. CPC/CBT's upgrade was secured by a power purchase agreement with West Kootenay Power (now UtiliCorp Networks Canada, Inc). Powerex entered into a Backstop Agreement with CPC/CBT to facilitate the Provincial Government's desire that CPC/CBT develop the Brilliant Dam upgrade. Under the Backstop Agreement, Powerex agreed to purchase electricity produced at the Brilliant facilities in the event West Kootenay Power defaults on its purchase obligation due to insolvency. A true copy of the Backstop Agreement is attached hereto as Exhibit J.

31. Powerex performs its role as the exclusive exporter of BC Hydro's surplus under my direction. I report in the normal course to my Board of Directors, but, on a day-to-

day basis, my management team and I are solely responsible for determining the manner in which Powerex meets its mandate to maximize the value of its export activities. Over the course of the 1990s, it became apparent that Powerex could better achieve its objectives by expanding its activities into acquiring and reselling power generated by parties other than BC Hydro. Again, under my direction, Powerex has expanded considerably in this area and has become an active trader in wholesale markets throughout North America. This has occurred under my direction and it is my belief that it has assisted British Columbia in achieving its objective of obtaining maximum value for the surplus power generated from British Columbia to the benefit of British Columbia taxpayers and ratepayers.

32. BC Hydro's Board of Directors appoints Powerex's Board of Directors. A number of Powerex's current executives previously worked at BC Hydro.

33. Powerex does not pay Canadian federal and Provincial income tax.

34. BC Hydro is a Crown corporation, incorporated in 1964 pursuant to the British Columbia Hydro and Power Authority Act. BC Hydro is owned in its entirety by Her Majesty the Queen in Right of the Province of British Columbia, by which name the Province of British Columbia (the "Province") is formally known. Dividends from the operations of BC Hydro are payable only to the Province.

35. The Lieutenant Governor in Council (the Executive Council of the Province) appoints BC Hydro's Board of Directors. A true copy of Orders in Council Nos. 751/2001, dated August 9, 2001, and 847/2001, dated September 25, 2001, appointing BC Hydro's Board of Directors, are attached hereto as Exhibit K. To my knowledge, no subsequent Orders in Council have been passed amending, rescinding, or superseding the above-described Orders in Council. BC Hydro, as the sole shareholder of Powerex, is authorized to appoint Powerex's Board of Directors. It does so by issuing a resolution naming the Board mem-

bers. Outside members of Powerex's current Board of Directors were subject to concurrence by the Office of the Premier. A true copy of the Extract from the Minutes of a Meeting of the Board of Directors of British Columbia Hydro and Power Authority held on October 18, 2001, is attached hereto as Exhibit L.

36. All substantive powers of BC Hydro are subject to, and can only be exercised with, the approval of the Lieutenant Governor in Council or the Minister responsible for BC Hydro.

37. BC Hydro's corporate objective is to support the development of the Province of British Columbia through the efficient supply of electricity. On behalf of the Province, BC Hydro operates an electric utility involved in the generation, transmission, and distribution of electricity.

38. BC Hydro maintains authority over Powerex through various arrangements, including a Risk Management Committee that oversees the financial exposure to which Powerex is subject. The Risk Management Committee is required to make periodic reports to the Provincial Government's Ministry of Finance.

39. BC Hydro also acts as the treasury for Powerex and facilitates the issuance of letters of credit in support of Powerex's commercial arrangements.

40. BC Hydro's borrowings and other fiscal arrangements are provided through, and therefore are supported by, the Provincial Government. As a result, BC Hydro maintains a credit rating equal to that of the Province. Powerex's commercial arrangements, in turn, are frequently supported by a guarantee from BC Hydro, thus providing Powerex the benefit of both BC Hydro's credit rating as well as the implied backing of the Provincial Government.

41. BC Hydro sells all of its surplus electricity to Powerex, and all of those sales take place at the Provincial border. BC Hydro does not, and has not, sold power at points of delivery in the United States. BC Hydro has

never participated in the bidding process established by the CalPX and ISO.

42. Powerex maintains two rate schedules on file with FERC under which it sells power generated by BC Hydro at wholesale in United States interstate commerce pursuant to market-based rate authority granted by FERC on September 24, 1997.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this Declaration was executed this 9th day of August 2002, at Belle Fourche, South Dakota.

/s/ Kenneth G. Peterson
KENNETH G. PETERSON

[Exhibits omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Coordination Proceeding Special Title (Rule 1550(b)) — No. CV 02-0990-RHW

WHOLESALE ELECTRICITY ANTITRUST CASES I & II

This Document relates To:

ALL ACTIONS

DEPOSITION OF KENNETH GRANT PETERSON

Volume 1, Page 1 - 113

Wednesday, August 21, 2002

* * * * *

[94]

* * * * *

Q. * * * Does BC Hydro have a pension plan?

A. Yes.

Q. Is it related to a government pension plan?

A. It's a separate pension plan from the government's plan.

Q. And are Powerex employees part of the BC Hydro [95] pension plan?

A. Yes, they are.

Q. And are they part of BC Hydro's – does BC Hydro have any other retirement plans?

A. No.

Q. Do Powerex employees have the same employee benefits as BC Hydro employees?

A. For the most part, in terms of standard employee benefits.

Q. Such as –

A. Medical, dental.

Q. Are there any limits on Powerex's ability to pay market compensation to its traders?

A. Yes.

Q. What are they?

A. In the broad context of Provincial guidelines on compensation we're under certain constraints. We have a bonus compensation program that's unique. No one else in the public service has anything like it. But that's in order to be competitive.

Q. But other than the bonus compensation plan, there are – are Powerex's employees paid within Provincial guidelines.

A. Not within Provincial guidelines.

Q. I'm sorry. I must have misunderstood what you [96] said before.

A. I said within the context of what could be accepted provincially, you might say. Again, public salaries or public-service salaries can be a political issue. Powerex aims to compensate at the median of the Canadian market for its traders.

Q. So higher compensation could be politically unpalatable?

A. Yes.

Q. And that would be a problem for the Provincial government?

A. Yes.

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-57200
(D.C. No. CV-02-01001-RHW)

PEOPLE OF THE STATE OF CALIFORNIA, ET AL.,
Plaintiffs,

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Intervenor,

v.

NRG ENERGY INC., ET AL.,
Defendants,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Cross-claimants-Appellants,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Cross-defendants-Appellees.

No. 02-57202
(D.C. No. CV-02-00990-RHW)

PEOPLE OF THE STATE OF CALIFORNIA, ET AL.,
Plaintiffs-Appellees,

v.

NRG ENERGY, INC., ET AL.,
Defendants,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Cross-claimants-Appellants,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Cross-defendants,

AND

BONNEVILLE POWER ADMINISTRATION, ET AL.,
Cross-defendants-Appellees.

No. 02-57210
(D.C. No. CV-02-01000-RHW)

NRG ENERGY, INC., ET AL.,
Defendants,

AND

RELIANT ENERGY SERVICES, INC., ET AL.,
Defendants-Appellants,

v.

DUKE ENERGY TRADING AND MARKETING, LLC, ET AL.,
Cross-claimants,

v.

ARIZONA PUBLIC SVC, ET AL.,
Cross-defendants-Appellees.

No. 03-55118
(D.C. No. CV-02-01000-RHW)

NRG ENERGY, INC., ET AL.,
Defendants,

v.

DUKE ENERGY TRADING AND MARKETING, LLC, ET AL.,
Cross-claimants-Appellees,

v.

ARIZONA PUBLIC SVC, ET AL.,
Cross-defendants,

AND

POWEREX CORP.,
Cross-defendant-Appellant.

No. 03-55131
(D.C. No. CV-02-00990-RHW)

PEOPLE OF THE STATE OF CALIFORNIA, ET AL.,
Plaintiffs,

v.

NRG ENERGY, INC., ET AL.,
Defendants,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Cross-claimants-Appellees,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Cross-defendants,

AND

POWEREX CORP.,
Cross-defendant-Appellant.

No. 03-55176
(D.C. No. CV-02-01001-RHW)

NRG ENERGY, INC., ET AL.,
Defendants-Appellees,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Cross-claimants-Appellees,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Cross-defendants,

AND

POWEREX CORP.,
Cross-defendant-Appellant.

No. 03-55241
(D.C. No. CV-02-01000-RHW)

NRG ENERGY, INC., ET AL.,
Defendants,

v.

DUKE ENERGY TRADING AND MARKETING, LLC, ET AL.,
Cross-claimants-Appellants,

v.

ARIZONA PUBLIC SVC, ET AL.,
Cross-defendants-Appellees.

No. 03-55249
(D.C. No. CV-02-01001-RHW)

NRG ENERGY, INC., ET AL.,
Defendants,

AND

DUKE ENERGY TRADING AND MARKETING, LLC, ET AL.,
Defendants -Appellants,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Cross-claimants,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Cross-defendants-Appellees.

No. 03-55266
(D.C. No. CV-02-00990-RHW)

PEOPLE OF THE STATE OF CALIFORNIA, ET AL.,
Plaintiffs-Appellees,

v.

NRG ENERGY, INC., ET AL.,
Defendants,

AND

DUKE ENERGY TRADING AND MARKETING, LLC, ET AL.,
Defendants-Appellants,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Cross-claimants,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Cross-defendants.

No. 03-55319
(D.C. No. CV-02-01000-RHW)

NRG ENERGY, INC., ET AL.,
Defendants,

v.

DUKE ENERGY TRADING AND MARKETING, LLC, ET AL.,
Cross-claimants-Appellees,

v.

ARIZONA PUBLIC SVC, ET AL.,
Cross-defendants,

AND

BONNEVILLE POWER ADMINISTRATION, ET AL.,
Cross-defendants-Appellants.

No. 03-55322
(D.C. No. CV-02-01001-RHW)

NRG ENERGY, INC., ET AL.,
Defendants,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Cross-claimants-Appellees,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Cross-defendants,

AND

BONNEVILLE POWER ADMINISTRATION, ET AL.

No. 03-55349
(D.C. No. CV-02-00990-RHW)

PEOPLE OF THE STATE OF CALIFORNIA, ET AL.,
Plaintiffs- Appellees,

v.

NRG ENERGY INC., ET AL.,
Defendants,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Cross-claimants-Appellees,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Cross-defendants

AND

BONNEVILLE POWER ADMINISTRATION, ET AL.,
Cross-defendants-Appellants.

Appeal from the United States District Court
for the Southern District of California,
Robert H. Whaley, U.S. District Judge, Presiding

[Argued June 14, 2004]

[Decided Dec. 8, 2004]

Before: SCHROEDER, Chief Judge, CANBY, and TALLMAN, Circuit Judges.

SCHROEDER, Chief Judge:

The fundamental question in this appeal from a district court order of remand is whether we have appellate jurisdiction in light of the limitations of 28 U.S.C. § 1447(d). We hold that we have jurisdiction to review the district court's ruling on substantive issues of controlling law on the merits of the case. We affirm all of the district court's rulings on those substantive issues, relating principally to

immunity, but hold that the claims against the U.S. government agencies should have been dismissed rather than remanded to state court.

BACKGROUND

The underlying consolidated actions are suits arising from the energy crisis of 2000-2001. *See generally Duke Energy Trading & Marketing, L.L.C. v. Davis*, 267 F.3d 1042 (9th Cir.2001). As a result of the crisis, the State of California, together with some of its private and corporate citizens, filed suits in California state courts against Reliant Energy, Duke Energy and other generators of power in the California energy market (collectively referred to as "Duke and Reliant"). The Plaintiffs alleged that Defendants conspired to fix prices of wholesale electricity in violation of California's Cartwright Act, Cal. Bus. & Prof. Code § 16720, *et. seq.*, and California's Unfair Competition Law, *id.* at § 17200.

Duke and Reliant filed cross-claims in the state court seeking indemnity from two agencies of the United States government, Bonneville Power Administration, ("BPA"), and Western Area Power Administration, ("WAPA"), and from two Canadian entities, PowerEx Corporation, ("PowerEx"), and British Columbia Hydro and Power Authority, ("BC Hydro"). Both BPA and WAPA are agencies of the United States Government statutorily authorized to promote the development, sale, and distribution of electric power in the western United States. *See* 16 U.S.C. § 832; 42 U.S.C. § 7152, 43 U.S.C. §§ 389, 485(h); *see also United States by W. Area Power Admin. v. Pac. Gas & Elec. Co.*, 714 F.Supp. 1039, 1045-47 (N.D.Cal.1989). BC Hydro is a crown corporation of the Canadian province of British Columbia created by the British Columbia Hydro and Power Authority Act of 1964. PowerEx is a wholly owned subsidiary of BC Hydro. PowerEx markets and exports surplus Canadian hydropower to the United States.

Each of the cross-defendants removed the cases to federal court. As the basis for removal, BPA and WAPA invoked 28 U.S.C. § 1442(a), which permits removal by fed-

eral agencies. BC Hydro and PowerEx invoked 28 U.S.C. § 1441(d), which allows removal by foreign states as defined by the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. § 1603(a). California then moved the district court for remand. BPA and WAPA opposed the remand, arguing that they were entitled to be dismissed from the action because they enjoyed sovereign immunity as agencies of the U.S. government. BC Hydro argued for dismissal on the ground that it was an immune foreign sovereign as defined by the FSIA. PowerEx opposed California's motion for remand on the ground it was entitled to remove under the removal statutes 28 U.S.C. § 1441(a)(d) and the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(a). PowerEx did not argue for sovereign immunity because the claim arises from commercial activities PowerEx conducted within the United States. *See* 28 U.S.C. § 1605(a)(2).

The district court ruled first on the immunity arguments. The court held that BC Hydro was entitled to foreign sovereign immunity under the FSIA as a crown corporation of British Columbia. As to the U.S. government agencies, Duke and Reliant contended BPA and WAPA had waived their immunity. The district court held that there had been no waiver because only Congress could waive immunity and Congress had not done so. It therefore held that the WAPA and BPA were immune from suit. Finally, the district court held that PowerEx was not entitled to removal because it was not the instrumentality of a foreign sovereign. Then the district court granted the earlier motion to remand the entire case.

Defendants-appellants, Duke and Reliant, now appeal, challenging the district court's holdings that BPA and WAPA have not waived their sovereign immunity, and that BC Hydro is immune from suit. Cross-appellants, BPA and WAPA, challenge the district court's decision to remand the entire case to state court, contending that the district court should first have dismissed them from the suit. Cross-appellant, PowerEx, challenges the district

court's ruling that it is not a sovereign as defined by the FSIA.

Plaintiff-appellee, California, happy to be back in state court, contends that this court is without jurisdiction to hear any of these appeals. It argues that 28 U.S.C. § 1447(d) prohibits the exercise of appellate jurisdiction over the district court's order of remand and that we therefore cannot review the substantive issues of law the district court resolved.

We first deal with the issue of appellate jurisdiction. We conclude that we have jurisdiction to review the underlying merits of the district court's substantive rulings on immunity and sovereign status. We then turn to the merits of those rulings.

APPELLATE JURISDICTION

The district court's final order that is on appeal to this court remands the case to state court following its original removal to federal court. Section 1447(c) provides that a motion for remand for procedural irregularities in the removal must be filed within 30 days and that a case may be remanded at any time if it appears that the district court lacks subject matter jurisdiction.[1]

Appellate review of a remand order pursuant to § 1447(c) is limited by the provisions of § 1447(d). Section 1447(d) provides:

> (d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

---

[1] Section 1447(c) provides:

> c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

The limitation relates on its face only to appellate review of federal jurisdiction or of whether the remand order itself was procedurally correct. Our court has therefore recognized that the limitations on review in § 1447(d) do not preclude our review of substantive issues of law that may have preceded the remand order. We have said that § 1447(d) "preclude[s] only appellate review of remand orders based on one of the two grounds listed in subsection 1447(c): lack of subject matter jurisdiction or removal procedure irregularities." *United Investors Life Ins. Co. v. Waddell & Reed*, 360 F.3d 960, 963 (9th Cir.2004), *citing Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28, 116 S.Ct. 494, 133 L.Ed.2d 461 (1995). Section 1447(d) does not preclude our review of a district court's resolution of substantive issues on the merits, apart from issues of jurisdictional or procedural defects leading to remand. *See Abada v. Charles Schwab & Co.*, 300 F.3d 1112, 1118 (9th Cir.2002), *citing Clorox Co. v. United States Dist. Ct.*, 779 F.2d 517, 520 (9th Cir.1985) and *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-77 (9th Cir.1984).

Moreover, the district court had jurisdiction over this case because BPA, WAPA and BC Hydro properly removed the case from state court. Such a removal removes the *entire* case, not merely the portion affecting the removing sovereign. *See IMFC Professional Services of Fla., Inc. v. Latin American Home Health, Inc.*, 676 F.2d 152, 158-59 (5th Cir.1980); *Nolan v. Boeing Co.*, 919 F.2d 1058, 1064-65 (5th Cir.1990). The district court accordingly did not lack jurisdiction to decide the issues of immunity of BPA, WAPA and BC Hydro and of the sovereign status of PowerEx. We accordingly are not deprived by § 1447(d) of jurisdiction to review these substantive rulings, and we now address them on their merits.

IMMUNITY OF THE U.S. AGENCIES: BPA AND WAPA

Reliant and Duke argue that the federal agencies waived their immunity by acting as generators, buyers, and sellers of electricity in the California energy markets. Specifically, Duke and Reliant contend that by agreeing to the Federal Energy Regulatory Commission, ("FERC"), tariff governing the California market, BPA and WAPA were bound by the provisions of the tariff. Under the tariff, participants in the California energy market "irrevocably waive any objection" to the jurisdiction of California courts over legal actions arising from the tariff. In essence, Duke and Reliant contend that by performing their statutory function to provide power to the western markets, BPA and WAPA became "participants" in that market within the meaning of FERC tariffs and thereby waived their governmental immunity.

The district court rejected the arguments of Duke and Reliant and concluded that BPA and WAPA did not waive their sovereign immunity. This ruling was correct because only Congress can waive immunity of a federal governmental agency and BPA and WAPA are indisputably such agencies.

In *Lane v. Pena*, 518 U.S. 187, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996), the Supreme Court unambiguously reaffirmed that "[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed [by Congress] in statutory text." *Id.* at 192, 116 S.Ct. 2092. Duke and Reliant point to no such text waiving the immunity of BPA or WAPA. Nor is there a statute waiving the sovereign immunity of BPA or WAPA with regard to suits for indemnity. *See* 16 U.S.C. § 832; 43 U.S.C. § 390uu; *see also City of Tacoma v. Richardson*, 163 F.3d 1337, 1339-41 (Fed.Cir.1998) (interpreting section 390uu and holding Congress has waived WAPA's sovereign immunity only with regard to contracts executed pursuant to federal reclamation law). The district court correctly concluded that BPA and WAPA retain their sovereign immunity.

IMMUNITY OF BC HYDRO UNDER THE FSIA

The district court held that BC Hydro was an immune foreign sovereign as defined by the Foreign Sovereign Immunities Act and was therefore not amenable to suit by Duke and Reliant. Under the FSIA, BC Hydro waived its foreign sovereign immunity if it: 1) conducted commercial activity in the U.S., or 2) engaged in commercial activity outside the U.S. having a "direct effect" in the United States. 28 U.S.C. § 1605(a)(2). Duke and Reliant argue that BC Hydro did both.

Duke and Reliant first argue that BC Hydro activity in Canada had a direct effect on California energy markets. They claim that BC Hydro made decisions that restricted how and with whom PowerEx, BC Hydro's exporting subsidiary, could trade. Because BC Hydro's decisions determined who in the California market received energy from PowerEx and at what price, Duke and Reliant claim that BC Hydro directly affected that market. Duke and Reliant also claim that BC Hydro's credit decisions were themselves commercial activities and therefore caused BC Hydro to forfeit its immunity.

A "direct effect" in the United States must follow "as an immediate consequence of [the otherwise immune defendant's] activity." *Argentina v. Weltover*, 504 U.S. 607, 618, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). The actions of BC Hydro did not cause direct effects in the United States within the meaning of the FSIA. Although the credit decisions of BC Hydro had a direct effect on PowerEx, it was only the decisions of PowerEx that directly affected the California markets. Because the credit decisions affected an intermediary, whose actions in turn affected the U.S., the decisions did not have direct effects within the United States. *See Corzo v. Banco Central De Reserva Del Peru*, 243 F.3d 519, 525 (9th Cir.2001).

Duke and Reliant also contend that BC Hydro lacks immunity in the case because its decisions about how to generate power and about how much power PowerEx could sell to the California markets were commercial acts with

direct effects in the U.S. The district court correctly held, however, that these decisions were sovereign functions, not commercial ones. BC Hydro is responsible for decisions relating to, for example, flood control, management of fisheries, and construction of dams. These are governmental responsibilities, unlike any responsibilities of a private, commercial actor. The ability to make decisions about the management of natural resources is a uniquely sovereign capacity. *See MOL, Inc. v. People's Republic of Bangladesh*, 736 F.2d 1326, 1329 (9th Cir.1984).

Next, appellants argue that PowerEx is the agent of BC Hydro and that BC Hydro waived its immunity by and through the conduct of its agent. The district court correctly held that there was no agency relationship between BC Hydro and PowerEx. Independence is to be presumed. In *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) ("*Bancec*"), the Supreme Court announced that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-27, 103 S.Ct. 2591. The presumption of independence is defeated only "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created." *Id.* at 629, 103 S.Ct. 2591; *see also Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1070-71 (9th Cir.2002).

As the district court carefully explained, no evidence suggests that BC Hydro exerted the day-to-day control over PowerEx that would demonstrate an agency relationship. *Cf. Flatow*, 308 F.3d at 1071-73 (noting absence of a showing of day-to day-control and rejecting agency argument). BC Hydro undoubtedly cooperated with PowerEx to establish PowerEx's credit risk policies and to provide PowerEx with administrative and other support for its operations. As the Supreme Court has noted, however, it is not at all remarkable for a parent organization to supervise the "finance and capital budget decisions" and to be

responsible for the "articulation of general policies and procedures" for a subsidiary. *United States v. Bestfoods*, 524 U.S. 51, 72, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998). These areas of cooperation are completely characteristic of a parent-subsidiary operation, and not at all like a principle-agent relationship. The district court correctly concluded that PowerEx was not the agent of BC Hydro.

For all of the foregoing reasons, BC Hydro did not waive its sovereign immunity under the FSIA.

SOVEREIGN STATUS OF POWEREX UNDER THE FSIA

In its cross-appeal PowerEx argues that the district court erred in holding that it is not a foreign sovereign under the FSIA, and that it therefore is not entitled to remove under § 1441(d). The statute defines a foreign sovereign as including "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). An agency or instrumentality is defined as any entity:

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b). PowerEx argues that it is a foreign sovereign both because it is an "organ" of a foreign state and alternatively because it is wholly owned by a foreign state.

In support of its contention that PowerEx is an organ of Canada, PowerEx cites this court's recent decision in *EIE Guam Corporation v. Long Term Credit Bank of Japan*, 322 F.3d 635, 640-41 (9th Cir.2003). In *EIE Guam*, we held that a Japanese corporation was an organ of Japan where that corporation (RCC) was created to collect and

administer bad debts of failed financial institutions insured by the Deposit Insurance Corporation of Japan. *Id.* at 640.

PowerEx argues that just as RCC served a public purpose in helping to manage the debts of failed Japanese banks, PowerEx serves a public purpose in maximizing the value of the Province's surplus hydropower. This is the only material similarity, however. There are substantial differences between PowerEx and RCC. In *EIE Guam*, the district court found that many of RCC's functions were exclusive, that other companies were not permitted to take similar actions, that RCC was funded by the Japanese government, and that the government even compensated RCC for its financial losses. *See id.* at 640.

In contrast, the district court here found that PowerEx acted not in the public interest, but rather as an independent commercial enterprise pursuing its own profits. The district court also found that any profits and losses from its sales of power are solely the responsibility of PowerEx and are in no way guaranteed or subsidized by the government. The Canadian government does not immunize PowerEx from suit.

We have said that the ultimate question is "whether the entity engages in a public activity on behalf of the foreign government." *Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir.2001), *aff'd on other grounds Dole Food Co. v. Patrickson*, 538 U.S. 468, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003). Applying *Patrickson*, we look to the purposes of an entity's activities, the entity's independence from government, the level of financial support received from the government, and the entity's privileges and obligations under the law. *Patrickson*, 251 F.3d at 807.

As the district court correctly noted, the facts of this case closely mirror the facts of *Patrickson* and compel our conclusion that PowerEx is not an organ of a foreign government. In *Patrickson*, as here, the party claiming organ status under the FSIA was not run by government appointees, was not staffed with civil servants, was not

wholly owned by the government, was not immune from suit, and did not exercise any regulatory authority. *See Patrickson*, 251 F.3d at 808. Even though PowerEx offers some evidence that it serves a public purpose, its high degree of independence from the government of British Columbia, combined with its lack of financial support from the government and its lack of special privileges or obligations under Canadian law dictate our holding that PowerEx is not an organ of British Columbia.

PowerEx also argues that it qualifies under the FSIA because it is owned by the Province of British Columbia. PowerEx concedes, however, that its shares are owned by BC Hydro. The Supreme Court has held that "only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement [of the FSIA]." *Dole Food*, 538 U.S. at 474, 123 S.Ct. 1655. The Court noted that formalities are essential in the law of corporations and that unless the foreign government itself actually owns the shares, the entity does not meet the definition of a foreign state. *Id.* at 474-76, 123 S.Ct. 1655. PowerEx is not owned by the Province but by BC Hydro. It is therefore not a foreign instrumentality under FSIA.

THE REMAND OF CLAIMS AGAINST THE UNITED STATES

In their cross-appeal, BPA and WAPA argue that although the district court correctly held them immune from suit, it incorrectly failed to dismiss the claims against them. They are correct.

Section 1442(a) guarantees federal agencies a federal forum in which to adjudicate claims. Where it is immune from suit, a federal agency's right to a federal forum is vindicated only by the district court's dismissal of the claims against the agency. Any other outcome would frustrate the purpose of § 1442(a).

We have previously held that where federal law prevents state and federal courts from subjecting a federal agency to suit, a district court presented with such a suit is required to dismiss it. *See Nebraska v. Bentson*, 146

F.3d 676, 679 (9th Cir.1998). The same result is required here. We therefore remand the claims against BPA and WAPA with instructions to dismiss them.

CONCLUSION

We AFFIRM the district court's decision that BC Hydro is an immune foreign sovereign under the Foreign Sovereign Immunities Act, but that its export subsidiary, PowerEx, is not such a sovereign or instrumentality of a sovereign. We also AFFIRM the district court's order that BPA and WAPA are immune from suit. We VACATE the portion of the district court's order remanding the claims against BPA and WAPA and instruct the district court to enter an order of dismissal.

AFFIRMED IN PART; VACATED IN PART and REMANDED. Costs are awarded to BPA, WAPA, and BC Hydro and against PowerEx.

TREATY BETWEEN THE UNITED STATES OF AMERICA AND CANADA RELATING TO COOPERATIVE DEVELOPMENT OF THE WATER RESOURCES OF THE COLUMBIA RIVER BASIN

The Governments of the United States of America and Canada

Recognizing that their peoples have, for many generations, lived together and cooperated with one another in many aspects of their national enterprises for the greater wealth and happiness of their respective nations, and

Recognizing that the Columbia River basin, as a part of the territory of both countries, contains water resources that are capable of contributing greatly to the economic growth and strength and to the general welfare of the two nations, and

Being desirous of achieving the development of those resources in a manner that will make the largest contribution to the economic progress of both countries and to the welfare of their peoples of which those resources are capable, and

Recognizing that the greatest benefit to each country can be secured by cooperative measures for hydroelectric power generation and flood control, which will make possible other benefits as well,

Have agreed as follows:

ARTICLE I

Interpretation

(1) In the Treaty, the expression—

(a) "average critical period load factor" means the average of the monthly load factors during the critical stream flow period;

(b) "base system" means the plants, works and facilities listed in the table in Annex B as enlarged from time to time by the installation of additional generating facilities, together with any other plants, works or

facilities which may be constructed on the main stem of the Columbia River in the United States of America;

(c) "Canadian storage" means the storage provided by Canada under Article II;

(d) "critical stream flow period" means the period, beginning with the initial release of stored water from full reservoir conditions and ending with the reservoirs empty, when the water available from reservoir releases plus the natural stream flow is capable of producing the least amount of hydroelectric power in meeting system load requirements;

(e) "consumptive use" means use of water for domestic, municipal, stock-water, irrigation, mining or industrial purposes but does not include use for the generation of hydroelectric power;

(f) "dam" means a structure to impound water, including facilities for controlling the release of the impounded water;

(g) "entity" means an entity designated by either the United States of America or Canada under Article XIV and includes its lawful successor;

(h) "International Joint Commission" means the Commission established under Article VII of the Boundary Waters Treaty, 1909, or any body designated by the United States of America and Canada to succeed to the functions of the Commission under this Treaty;

(i) "maintenance curtailment" means an interruption or curtailment which the entity responsible therefor considers necessary for purposes of repairs, replacements, installations of equipment, performance of other maintenance work, investigations and inspections;

(j) "monthly load factor" means the ratio of the average load for a month to the integrated maximum load over one hour during that month;

(k) "normal full pool elevation" means the elevation to which water is stored in a reservoir by deliberate impoundment every year, subject to the availability of sufficient flow;

(l) "ratification date" means the day on which the instruments of ratification of the Treaty are exchanged;

(m) "storage" means the space in a reservoir which is usable for impounding water for flood control or for regulating stream flows for hydroelectric power generation;

(n) "Treaty" means this Treaty and its Annexes A and B;

(o) "useful life" means the time between the date of commencement of operation of a dam or facility and the date of its permanent retirement from service by reason of obsolescence or wear and tear which occurs notwithstanding good maintenance practices.

2) The exercise of any power, or the performance of any duty, under the Treaty does not preclude a subsequent exercise or performance of the power or duty.

ARTICLE II

Development by Canada

1) Canada shall provide in the Columbia River basin in Canada 15,500,000 acre-feet of storage usable for improving the flow of the Columbia River.

2) In order to provide this storage, which in the Treaty is referred to as the Canadian storage, Canada shall construct dams:

(a) on the Columbia River near Mica Creek, British Columbia, with approximately 7,000,000 acre-feet of storage;

(b) near the outlet of Arrow Lakes, British Columbia, with approximately 7,100,000 acre-feet of storage; and

(c) on one or more tributaries of the Kootenay River in British Columbia downstream from the Canada-United States of America boundary with storage equivalent in effect to approximately 1,400,000 acre-feet of storage near Duncan Lake, British Columbia.

(3) Canada shall commence construction of the dams as soon as possible after the ratification date.

ARTICLE III

Development by the United States of America Respecting Power

(1) The United States of America shall maintain and operate the hydroelectric facilities included in the base system and any additional hydroelectric facilities constructed on the main stem of the Columbia River in the United States of America in a manner that makes the most effective use of the improvement in stream flow resulting from operation of the Canadian storage for hydroelectric power generation in the United States of America power system.

(2) The obligation in paragraph (1) is discharged by reflecting in the determination of downstream power benefits to which Canada is entitled the assumption that the facilities referred to in paragraph (1) were maintained and operated in accordance therewith.

ARTICLE IV

Operation by Canada

(1) For the purpose of increasing hydroelectric power generation in the United States of America and Canada, Canada shall operate the Canadian storage in accordance with Annex A and pursuant to hydroelectric operating plans made thereunder. For the purposes of this obligation an operating plan if it is either the first operating plan or if in the view of either the United States of America or Canada it departs substantially from the immediately preceding operating plan must, in order to be effective, be confirmed

by an exchange of notes between the United States of America and Canada.

(2) For the purpose of flood control until the expiration of sixty years from the ratification date, Canada shall

(a) operate in accordance with Annex A and pursuant to flood control operating plans made thereunder

(i) 80,000 acre-feet of the Canadian storage described in Article II(2)(a),

(ii) 7,100,000 acre-feet of the Canadian storage described in Article II(2)(b),

(iii) 1,270,000 acre-feet of the Canadian storage described in Article II(2)(c),

provided that the Canadian entity may exchange flood control storage under subparagraph (ii) for flood control storage additional to that under subparagraph (i), at the location described in Article II(2)(a), if the entities agree that the exchange would provide the same effectiveness for control of floods on the Columbia River at the Dalles, Oregon;

(b) operate any additional storage in the Columbia River basin in Canada, when called upon by an entity designated by the United States of America for that purpose, within the limits of existing facilities and as the entity requires to meet flood control needs for the duration of the flood period for which the call is made.

(3) For the purpose of flood control after the expiration of sixty years from the ratification date, and for so long as the flows in the Columbia River in Canada continue to contribute to potential flood hazard in the United States of America, Canada shall, when called upon by an entity designated by the United States of America for that purpose, operate within the limits of existing facilities any storage in the Columbia River basin in Canada as the entity requires to meet flood control needs for the duration of the flood period for which the call is made.

(4) The return to Canada for hydroelectric operation and the compensation to Canada for flood control operation shall be as set out in Articles V and VI.

(5) Any water resource development, in addition to the Canadian storage, constructed in Canada after the ratification date shall not be operated in a way that adversely affects the stream flow control in the Columbia River within Canada so as to reduce the flood control and hydroelectric power benefits which the operation of the Canadian storage in accordance with the operating plans in force from time to time would otherwise produce.

(6) As soon as any Canadian storage becomes operable Canada shall commence operation thereof in accordance with this Article and in any event shall commence full operation of the Canadian storage described in Article II(2)(b) and Article II(2)(c) within five years of the ratification date and shall commence full operation of the balance of the Canadian storage within nine years of the ratification date.

ARTICLE V

Entitlement to Downstream Power Benefits

(1) Canada is entitled to one half the downstream power benefits determined under Article VII.

(2) The United States of America shall deliver to Canada at a point on the Canada-United States of America boundary near Oliver, British Columbia, or at such other place as the entities may agree upon, the downstream power benefits to which Canada is entitled, less

(a) transmission loss,

(b) the portion of the entitlement disposed of under Article VIII(1), and

(c) the energy component described in Article VIII(4).

(3) The entitlement of Canada to downstream power benefits begins for any portion of Canadian storage upon commencement of its operation in accordance with Annex A

and pursuant to a hydroelectric operating plan made thereunder.

ARTICLE VI

Payment for Flood Control

(1) For the flood control provided by Canada under Article IV(2)(a) the United States of America shall pay Canada in United States funds:

(a) 1,200,000 dollars upon the commencement of operation of the storage referred to in subparagraph (a)(i) thereof,

(b) 52,100,000 dollars upon the commencement of operation of the storage referred to in subparagraph (a)(ii) thereof, and

(c) 11,100,000 dollars upon the commencement of operation of the storage referred to in subparagraph (a)(iii) thereof.

(2) If full operation of any storage is not commenced within the time specified in Article IV, the amount set forth in paragraph (1) of this Article with respect to that storage shall be reduced as follows:

(a) under paragraph (1)(a), 4,500 dollars for each month beyond the required time,

(b) under paragraph (1)(b), 192,100 dollars for each month beyond the required time, and

(c) under paragraph (1)(c), 40,800 dollars for each month beyond the required time.

(3) For the flood control provided by Canada under Article IV(2)(b) the United States of America shall pay Canada in United States funds in respect only of each of the first four flood periods for which a call is made 1,875,000 dollars and shall deliver to Canada in respect of each and every call made, electric power equal to the hydroelectric power lost by Canada as a result of operating the storage to meet the flood control need for which the call was made, delivery to be made when the loss of hydroelectric power occurs.

(4) For each flood period for which flood control is provided by Canada under Article IV(3) the United States of America shall pay Canada in United States funds:

(a) the operating cost incurred by Canada in providing the flood control, and

(b) compensation for the economic loss to Canada arising directly from Canada foregoing alternative uses of the storage used to provide the flood control.

(5) Canada may elect to receive in electric power, the whole or any portion of the compensation under paragraph (4)(b) representing loss of hydroelectric power to Canada.

ARTICLE VII

Determination of Downstream Power Benefits

(1) The downstream power benefits shall be the difference in the hydroelectric power capable of being generated in the United States of America with and without the use of Canadian storage, determined in advance, and is referred to in the Treaty as the downstream power benefits.

(2) For the purpose of determining the downstream power benefits:

(a) the principles and procedures set out in Annex B shall be used and followed;

(b) the Canadian storage shall be considered as next added to 13,000,000 acre-feet of the usable storage listed in Column 4 of the table in Annex B;

(c) the hydroelectric facilities included in the base system shall be considered as being operated to make the most effective use for hydroelectric power generation of the improvement in stream flow resulting from operation of the Canadian storage.

(3) The downstream power benefits to which Canada is entitled shall be delivered as follows:

(a) dependable hydroelectric capacity as scheduled by the Canadian entity, and

(b) average annual usable hydroelectric energy in equal amounts each month, or in accordance with a modification agreed upon under paragraph (4).

(4) Modification of the obligation in paragraph (3)(b) may be agreed upon by the entities.

ARTICLE VIII

Disposal of Entitlement to Downstream Power Benefits

(1) With the authorization of the United States of America and Canada evidenced by exchange of notes, portions of the downstream power benefits to which Canada is entitled may be disposed of within the United States of America. The respective general conditions and limits within which the entities may arrange initial disposals shall be set out in an exchange of notes to be made as soon as possible after the ratification date.

(2) The entities may arrange and carry out exchanges of dependable hydroelectric capacity and average annual usable hydroelectric energy to which Canada is entitled for average annual usable hydroelectric energy and dependable hydroelectric capacity respectively.

(3) Energy to which Canada is entitled may not be used in the United States of America except in accordance with paragraphs (1) and (2).

(4) The bypassing at dams on the main stem of the Columbia River in the United States of America of an amount of water which could produce usable energy equal to the energy component of the downstream power benefits to which Canada is entitled but not delivered to Canada under Article V or disposed of in accordance with paragraphs (1) and (2) at the time the energy component was not so delivered or disposed of, is conclusive evidence that such energy component was not used in the United States of America and that the entitlement of Canada to such energy component is satisfied.

ARTICLE IX

Variation of Entitlement to Downstream Power Benefits

(1) If the United States of America considers with respect to any hydroelectric power project planned on the main stem of the Columbia River between Priest Rapids Dam and McNary Dam that the increase in entitlement of Canada to downstream power benefits resulting from the operation of the project would produce a result which would not justify the United States of America in incurring the costs of construction and operation of the project, the United States of America and Canada at the request of the United States of America shall consider modification of the increase in entitlement.

(2) An agreement reached for the purposes of this Article shall be evidenced by an exchange of notes.

ARTICLE X

East-West Standby Transmission

(1) The United States of America shall provide in accordance with good engineering practice east-west standby transmission service adequate to safeguard the transmission from Oliver, British Columbia, to Vancouver, British Columbia, of the downstream power benefits to which Canada is entitled and to improve system stability of the east-west circuits in British Columbia.

(2) In consideration of the standby transmission service, Canada shall pay the United States of America in Canadian funds the equivalent of 1.50 United States dollars a year for each kilowatt of dependable hydroelectric capacity included in the downstream power benefits to which Canada is entitled.

(3) When a mutually satisfactory electrical coordination arrangement is entered into between the entities and confirmed by exchange of notes between the United States of America and Canada the obligation of Canada in paragraph (2) ceases.

ARTICLE XI

Use of Improved Stream Flow

(1) Improvement in stream flow in one country brought about by operation of storage constructed under the Treaty in the other country shall not be used directly or indirectly for hydroelectric power purposes except:

(a) in the case of use within the United States of America with the prior approval of the United States entity, and

(b) in the case of use within Canada with the prior approval of the authority in Canada having jurisdiction.

(2) The approval required by this Article shall not be given except upon such conditions, consistent with the Treaty, as the entity or authority considers appropriate.

ARTICLE XII

Kootenai River Development

(1) The United States of America for a period of five years from the ratification date, has the option to commence construction of a dam on the Kootenai River near Libby, Montana, to provide storage to meet flood control and other purposes in the United States America. The storage reservoir of the dam shall not raise the level of the Kootenai River at the Canada-United States of America boundary above an elevation consistent with a normal full pool elevation at the dam of 2,459 feet, United States Coast and Geodetic Survey datum, 1929 General Adjustment, 1947 International Supplemental Adjustment.

(2) All benefits which occur in either country from the construction and operation of the storage accrue to the country in which the benefits occur.

(3) The United States of America shall exercise its option by written notice to Canada and shall submit with the notice a schedule of construction which shall include provision for commencement of construction, whether by way of

railroad relocation work or otherwise, within five years of the ratification date.

(4) If the United States of America exercises its option, Canada in consideration of the benefits accruing to it under paragraph (2) shall prepare and make available for flooding the land in Canada necessary for the storage reservoir of the dam within a period consistent with the construction schedule.

(5) If a variation in the operation of the storage is considered by Canada to be of advantage to it the United States of America shall, upon request, consult with Canada. If the United States of America determines that the variation would not be to its disadvantage it shall vary the operation accordingly.

(6) The operation of the storage by the United States of America shall be consistent with any order of approval which may be in force from time to time relating to the levels of Kootenay Lake made by the International Joint Commission under the Boundary Waters Treaty, 1909.

(7) Any obligation of Canada under this Article ceases if the United States of America, having exercised the option, does not commence construction of the dam in accordance with the construction schedule.

(8) If the United States of America exercises the option it shall commence full operation of the storage within seven years of the date fixed in the construction schedule for commencement of construction.

(9) If Canada considers that any portion of the land referred to in paragraph (4) is no longer needed for the purpose of this Article the United States of America and Canada, at the request of Canada, shall consider modification of the obligation of Canada in paragraph (4).

(10) If the Treaty is terminated before the end of the useful life of the dam Canada shall for the remainder of the useful life of the dam continue to make available for the storage reservoir of the dam any portion of the land made available under paragraph (4) that is not required by Can-

ada for purposes of diversion of the Kootenay River under Article XIII.

ARTICLE XIII

Diversions

(1) Except as provided in this Article neither the United States of America nor Canada shall, without the consent of the other evidenced by an exchange of notes, divert for any use, other than a consumptive use, any water from its natural channel in a way that alters the flow of any water as it crosses the Canada-United States of America boundary within the Columbia River basin.

(2) Canada has the right, after the expiration of twenty years from the ratification date, to divert not more than 1,500,000 acre-feet of water a year from the Kootenay River in the vicinity of Canal Flats, British Columbia, to the headwaters of the Columbia River, provided that the diversion does not reduce the flow of the Kootenay River immediately downstream from the point of diversion below the lesser of 200 cubic feet per second or the natural flow.

(3) Canada has the right, exercisable at any time during the period commencing sixty years after the ratification date and expiring one hundred years after the ratification date, to divert to the headwaters of the Columbia River any water which, in its natural channel, would flow in the Kootenay River across the Canada-United States of America boundary, provided that the diversion does not reduce the flow of the Kootenay River at the Canada-United States of America boundary near Newgate, British Columbia, below the lesser of 2,500 cubic feet per second or the natural flow.

(4) During the last twenty years of the period within which Canada may exercise the right to divert described in paragraph (3) the limitation on diversion is the lesser of 1,000 cubic feet per second or the natural flow.

(5) Canada has the right:

(a) if the United States of America does not exercise the option in Article XII(1), or

(b) if it is determined that the United States of America, having exercised the option, did not commence construction of the dam referred to in Article XII in accordance therewith or that the United States of America is in breach of the obligation in that Article to commence full operation of the storage,

to divert to the headwaters of the Columbia River any water which, in its natural channel, would flow in the Kootenay River across the Canada-United States of America boundary, provided that the diversion does not reduce the flow of the Kootenay River at the Canada-United States of America boundary near Newgate, British Columbia, below the lesser of 1,000 cubic feet per second or the natural flow.

(6) If a variation in the use of the water diverted under paragraph (2) is considered by the United States of America to be of advantage to it Canada shall, upon request, consult with the United States of America. If Canada determines that the variation would not be to its disadvantage it shall vary the use accordingly.

ARTICLE XIV

Arrangements for Implementation

(1) The United States of America and Canada shall each, as soon as possible after the ratification date, designate entities and when so designated the entities are empowered and charged with the duty to formulate and carry out the operating arrangements necessary to implement the Treaty. Either the United States of America or Canada may designate one or more entities. If more than one is designated the powers and duties conferred upon the entities by the Treaty shall be allocated among them in the designation.

(2) In addition to the powers and duties dealt with specifically elsewhere in the Treaty the powers and duties of the entities include:

(a) coordination of plans and exchange of information relating to facilities to be used in producing and obtaining the benefits contemplated by the Treaty,

(b) calculation of and arrangements for delivery of hydroelectric power to which Canada is entitled for providing flood control,

(c) calculation of the amounts payable to the United States of America for standby transmission services,

(d) consultation on requests for variations made pursuant to Articles XII(5) and XIII(6),

(e) the establishment and operation of a hydrometeorological system as required by Annex A,

(f) assisting and cooperating with the Permanent Engineering Board in the discharge of its functions,

(g) periodic calculation of accounts,

(h) preparation of the hydroelectric operating plans and the flood control operating plans for the Canadian storage together with determination of the downstream power benefits to which Canada is entitled,

(i) preparation of proposals to implement Article VIII and carrying out any disposal authorized or exchange provided for therein,

(j) making appropriate arrangements for delivery to Canada of the downstream power benefits to which Canada is entitled including such matters as load factors for delivery, times and points of delivery, and calculation of transmission loss,

(k) preparation and implementation of detailed operating plans that may produce results more advantageous to both countries than those that would arise from operation under the plans referred to in Annexes A and B.

(3) The entities are authorized to make maintenance curtailments. Except in case of emergency, the entity responsible for a maintenance curtailment shall give notice to the corresponding United States or Canadian entity of the curtailment, including the reason therefor and the probable duration thereof and shall both schedule the curtailment with a view to minimizing its impact and exercise due diligence to resume full operation.

(4) The United States of America and Canada may by an exchange of notes empower or charge the entities with any other matter coming within the scope of the Treaty.

ARTICLE XV

Permanent Engineering Board

(1) A Permanent Engineering Board is established consisting of four members, two to be appointed by Canada and two by the United States of America. The initial appointments shall be made within three months of the ratification date.

(2) The Permanent Engineering Board shall:

(a) assemble records of the flows of the Columbia River and the Kootenay River at the Canada-United States of America boundary;

(b) report to the United States of America and Canada whenever there is substantial deviation from the hydroelectric and flood control operating plans and if appropriate include in the report recommendations for remedial action and compensatory adjustments;

(c) assist in reconciling differences concerning technical or operational matters that may arise between the entities;

(d) make periodic inspections and require reports as necessary from the entities with a view to ensuring that the objectives of the Treaty are being met;

(e) make reports to the United States of America and Canada at least once a year of the results being achieved under the Treaty and make special reports concerning any matter which it considers should be brought to their attention;

(f) investigate and report with respect to any other matter coming within the scope of the Treaty at the request of either the United States of America or Canada.

(3) Reports of the Permanent Engineering Board made in the course of the performance of its functions under this Article shall be *prima facie* evidence of the facts therein contained and shall be accepted unless rebutted by other evidence.

(4) The Permanent Engineering Board shall comply with directions, relating to its administration and procedures, agreed upon by the United States of America and Canada as evidenced by an exchange of notes.

ARTICLE XVI

Settlement of Differences

(1) Differences arising under the Treaty which the United States of America and Canada cannot resolve may be referred by either to the International Joint Commission for decision.

(2) If the International Joint Commission does not render a decision within three months of the referral or within such other period as may be agreed upon by the United States of America and Canada, either may then submit the difference to arbitration by written notice to the other.

(3) Arbitration shall be by a tribunal composed of a member appointed by Canada, a member appointed by the United States of America and a member appointed jointly by the United States of America and Canada who shall be Chairman. If within six weeks of the delivery of a notice under paragraph (2) either the United States of America or Canada has failed to appoint its member, or they are

unable to agree upon the member who is to be Chairman, either the United States of America or Canada may request the President of the International Court of Justice to appoint the member or members. The decision of a majority of the members of an arbitration tribunal shall be the decision of the tribunal.

(4) The United States of America and Canada shall accept as definitive and binding and shall carry out any decision of the International Joint Commission or an arbitration tribunal.

(5) Provision for the administrative support of a tribunal and for remuneration and expenses of its members shall be as agreed in an exchange of notes between the United States of America and Canada.

(6) The United States of America and Canada may agree by an exchange of notes on alternative procedures for settling differences arising under the Treaty, including reference of any difference to the International Court of Justice for decision.

ARTICLE XVII

Restoration of Pre-Treaty Legal Status

(1) Nothing in this Treaty and no action taken or foregone pursuant to its provisions shall be deemed, after its termination or expiration, to have abrogated or modified any of the rights or obligations of the United States of America or Canada under then existing international law, with respect to the uses of the water resources of the Columbia River basin.

(2) Upon termination of this Treaty, the Boundary Waters Treaty, 1909, shall, if it has not been terminated, apply to the Columbia River basin, except insofar as the provisions of that Treaty may be inconsistent with any provision of this Treaty which continues in effect.

(3) Upon termination of this Treaty, if the Boundary Waters Treaty, 1909, has been terminated in accordance with Article XIV of that Treaty, the provisions of Article II of

that Treaty shall continue to apply to the waters of the Columbia River basin.

(4) If upon the termination of this Treaty Article II of the Boundary Waters Treaty, 1909, continues in force by virtue of paragraph (3) of this Article the effect of Article II of that Treaty with respect to the Columbia River basin may be terminated by either the United States of America or Canada delivering to the other one year's written notice to that effect; provided however that the notice may be given only after the termination of this Treaty.

(5) If, prior to the termination of this Treaty, Canada undertakes works usable for and relating to a diversion of water from the Columbia River basin, other than works authorized by or undertaken for the purpose of exercising a right under Article XIII or any other provision of this Treaty, paragraph (3) of this Article shall cease to apply one year after delivery by either the United States of America or Canada to the other of written notice to that effect.

ARTICLE XVIII

Liability for Damage

(1) The United States of America and Canada shall be liable to the other and shall make appropriate compensation to the other in respect of any act, failure to act, omission or delay amounting to a breach of the Treaty or of any of its provisions other than an act, failure to act, omission or delay occurring by reason of war, strike, major calamity, act of God, uncontrollable force or maintenance curtailment.

(2) Except as provided in paragraph (1) neither the United States of America nor Canada shall be liable to the other or to any person in respect of any injury, damage or loss occurring in the territory of the other caused by any act, failure to act, omission or delay under the Treaty whether the injury, damage or loss results from negligence or otherwise.

(3) The United States of America and Canada, each to the extent possible within its territory, shall exercise due diligence to remove the cause of and to mitigate the effect of any injury, damage or loss occurring in the territory of the other as a result of any act, failure to act, omission or delay under the Treaty.

(4) Failure to commence operation as required under Articles IV and XII is not a breach of the Treaty and does not result in the loss of rights under the Treaty if the failure results from a delay that is not wilful or reasonably avoidable.

(5) The compensation payable under paragraph (1):

(a) in respect of a breach by Canada of the obligation to commence full operation of a storage, shall be forfeiture of entitlement to downstream power benefits resulting from the operation of that storage, after operation commences, for a period equal to the period between the day of commencement of operation and the day when commencement should have occurred;

(b) in respect of any other breach by either the United States of America or Canada, causing loss of power benefits, shall not exceed the actual loss in revenue from the sale of hydroelectric power.

ARTICLE XIX

Period of Treaty

(1) The Treaty shall come into force on the ratification date.

(2) Either the United States of America or Canada may terminate the Treaty other than Article XIII (except paragraph (1) thereof), Article XVII and this Article at any time after the Treaty has been in force for sixty years if it has delivered at least ten years written notice to the other of its intention to terminate the Treaty.

(3) If the Treaty is terminated before the end of the useful life of a dam built under Article XII then, notwithstanding termination, Article XII remains in force until the end of the useful life of the dam.

(4) If the Treaty is terminated before the end of the useful life of the facilities providing the storage described in Article IV(3) and if the conditions described therein exist then, notwithstanding termination, Articles IV(3) and VI(4) and (5) remain in force until either the end of the useful life of those facilities or until those conditions cease to exist, whichever is the first to occur.

ARTICLE XX

Ratification

The instruments of ratification of the Treaty shall be exchanged by the United States of America and Canada at Ottawa, Canada.

ARTICLE XXI

Registration with the United Nations

In conformity with Article 102 of the Charter of the United Nations, the Treaty shall be registered by Canada with the Secretariat of the United Nations.

This Treaty has been done in duplicate copies in the English language.

IN WITNESS WHEREOF the undersigned, duly authorized by their respective Governments, have signed this Treaty at Washington, District of Columbia, United States of America, this 17th day of January, 1961.

FOR THE UNITED STATES OF AMERICA:

DWIGHT D. EISENHOWER
President of the United States of America

CHRISTIAN A. HERTER
Secretary of State

ELMER F. BENNETT
Under Secretary of the Interior

FOR CANADA:

JOHN G. DIEFENBAKER
Prime Minister of Canada

E. D. FULTON
Minister of Justice

A. D. P. HEENEY
Ambassador Extraordinary and Plenipotentiary of Canada to the United States of America

ANNEX A

PRINCIPLES OF OPERATION

General

1. The Canadian storage provided under Article II will be operated in accordance with the procedures described herein.

2. A hydrometeorological system, including snow courses, precipitation stations and stream flow gauges will be established and operated, as mutually agreed by the entities and in consultation with the Permanent Engineering Board, for use in establishing data for detailed programming of flood control and power operations. Hydrometeorological information will be made available to the entities in both countries for immediate and continuing use in flood control and power operations.

3. Sufficient discharge capacity at each dam to afford the desired regulation for power and flood control will be provided through outlet works and turbine installations as mutually agreed by the entities. The discharge capacity provided for flood control operations will be large enough to pass inflow plus sufficient storage releases during the evacuation period to provide the storage space required. The discharge capacity will be evaluated on the basis of full use of any conduits provided for that purpose plus one half the hydraulic capacity of the turbine installation at the time of commencement of the operation of storage under the Treaty.

4. The outflows will be in accordance with storage reservation diagrams and associated criteria established for flood control purposes and with reservoir-balance relationships established for power operations. Unless otherwise agreed by the entities the average weekly outflows shall not be less than 3,000 cubic feet per second at the dam described in Article II(2)(a), not less than 5,000 cubic feet per second at the dam described in Article II(2)(b) and not less than 1,000 cubic feet per second at the dam described in Article II(2)(c). These minimum average weekly releases

may be scheduled by the Canadian entity as required for power or other purposes.

Flood Control

5. For flood control operation, the United States entity will submit flood control operating plans which may consist of or include flood control storage reservation diagrams and associated criteria for each of the dams. The Canadian entity will operate in accordance with these diagrams or any variation which the entities agree will not derogate from the desired aim of the flood control plan. The use of these diagrams will be based on data obtained in accordance with paragraph 2. The diagrams will consist of relationships specifying the flood control storage reservations required at indicated times of the year for volumes of forecast runoff. After consultation with the Canadian entity the United States entity may from time to time as conditions warrant adjust these storage reservation diagrams within the general limitations of flood control operation. Evacuation of the storages listed hereunder will be guided by the flood control storage reservation diagrams and refill will be as requested by the United States entity after consultation with the Canadian entity. The general limitations of flood control operation are as follows:

(a) The Dam described in Article II(2)(a) – The reservoir will be evacuated to provide up to 80,000 acre-feet of storage, if required, for flood control use by May 1 of each year.

(b) The Dam described in Article II(2)(b) – The reservoir will be evacuated to provide up to 7,100,000 acre-feet of storage, if required, for flood control use by May 1 of each year.

(c) The Dam described in Article II(2)(c) – The reservoir will be evacuated to provide up to 700,000 acre-feet of storage, if required, for flood control use by April 1 of each year and up to 1,270,000 acre-feet of storage, if required, for flood control use by May 1 of each year.

(d) The Canadian entity may exchange flood control storage provided in the reservoir referred to in subparagraph (b) for additional storage provided in the reservoir referred to in subparagraph (a) if the entities agree that the exchange would provide the same effectiveness for control of floods on the Columbia River at The Dalles, Oregon.

Power

6. For power generating purposes the 15,500,000 acre feet of Canadian storage will be operated in accordance with operating plans designed to achieve optimum power generation downstream in the United States of America until such time as power generating facilities are installed at the site referred to in paragraph 5(a) or at sites in Canada downstream therefrom.

7. After at-site power is developed at the site referred to in paragraph 5(a) or power generating facilities are placed in operation in Canada downstream from that site, the storage operation will be changed so as to be operated in accordance with operating plans designed to achieve optimum power generation at-site in Canada and downstream in the United States of America and Canada, including consideration of any agreed electrical coordination between the two countries. Any reduction in the downstream power benefits in the United States of America resulting from that change in operation of the Canadian storage shall not exceed in any one year the reduction in downstream power benefits in the United States of America which would result from reducing by 500,000 acre-feet the Canadian storage operated to achieve optimum power generation in the United States of America and shall not exceed at any time during the period of the Treaty the reduction in downstream power benefits in the United States of America which would result from similarly reducing the Canadian storage by 3,000,000 acre-feet.

8. After at-site power is developed at the site referred to in paragraph 5(a) or power generating facilities are placed in operation in Canada downstream from that site, storage

may be operated to achieve optimum generation of power in the United States of America alone if mutually agreed by the entities in which event the United States of America shall supply power to Canada to offset any reduction in Canadian generation which would be created as a result of such operation as compared to operation to achieve optimum power generation at-site in Canada and downstream in the United States of America and Canada. Similarly, the storage may be operated to achieve optimum generation of power in Canada alone if mutually agreed by the entities in which event Canada shall supply power to the United States of America to offset any reduction in United States generation which would be created as a result of such operation as compared to operation to achieve optimum power generation at-site in Canada and downstream in the United States of America and Canada.

9. Before the first storage becomes operative, the entities will agree on operating plans and the resulting downstream power benefits for each year until the total of 15,500,000 acre-feet of storage in Canada becomes operative. In addition, commencing five years before the total of 15,500,000 acre-feet of storage is expected to become operative, the entities will agree annually on operating plans and the resulting downstream power benefits for the sixth succeeding year of operation thereafter. This procedure will continue during the life of the Treaty, providing to both the entities, in advance, an assured plan of operation of the Canadian storage and a determination of the resulting downstream power benefits for the next succeeding five years.

ANNEX B

DETERMINATION OF DOWNSTREAM POWER BENEFITS

1. The downstream power benefits in the United States of America attributable to operation in accordance with Annex A of the storage provided by Canada under Article II will be determined in advance and will be the estimated increase in dependable hydroelectric capacity in kilowatts for agreed critical stream flow periods and the increase in average annual usable hydroelectric energy output in kilowatt hours on the basis of an agreed period of stream flow record.

2. The dependable hydroelectric capacity to be credited to Canadian storage will be the difference between the average rates of generation in kilowatts during the appropriate critical stream flow periods for the United States of America base system, consisting of the projects listed in the table, with and without the addition of the Canadian storage, divided by the estimated average critical period load factor. The capacity credit shall not exceed the difference between the capability of the base system without Canadian storage and the maximum feasible capability of the base system with Canadian storage, to supply firm load during the critical stream flow periods.

3. The increase in the average annual usable hydroelectric energy will be determined by first computing the difference between the available hydroelectric energy at the United States base system with and without Canadian storage. The entities will then agree upon the part of available energy which is usable with and without Canadian storage, and the difference thus agreed will be the increase in average annual usable hydroelectric energy. Determination of the part of the energy which is usable will include consideration of existing and scheduled transmission facilities and the existence of markets capable of using the energy on a contractual basis similar to the then existing contracts. The part of the available energy which is considered usable shall be the sum of:

(a) the firm energy,

(b) the energy which can be used for thermal power displacement in the Pacific Northwest Area as defined in Paragraph 7, and

(c) the amount of the remaining portion of the available energy which is agreed by the entities to be usable and which shall not exceed in any event 40% of that remainder.

4. An initial determination of the estimated downstream power benefits in the United States of America from Canadian storage added to the United States base system will be made before any of the Canadian storage becomes operative. This determination will include estimates of the downstream power benefits for each year until the total of 15,500,000 acre-feet of Canadian storage becomes operative.

5. Commencing five years before the total of 15,500,000 acre-feet of storage is expected to become operative, estimates of downstream power benefits will be calculated annually for the sixth succeeding year on the basis of the assured plan of operation for that year.

6. The critical stream flow period and the details of the assured plan of operation will be agreed upon by the entities at each determination. Unless otherwise agreed upon by the entities, the determination of the downstream power benefits shall be based upon stream flows for the twenty year period beginning with July 1928 as contained in the report entitled Modified Flows at Selected Power Sites – Columbia River Basin, dated June 1957. No retroactive adjustment in downstream power benefits will be made at any time during the period of the Treaty. No reduction in the downstream power benefits credited to Canadian storage will be made as a result of the load estimate in the United States of America, for the year for which the determination is made, being less than the load estimate for the preceding year.

7. In computing the increase in dependable hydroelectric capacity and the increase in average annual hydroelectric energy, the procedure shall be in accordance with the

three steps described below and shall encompass the loads of the Pacific Northwest Area. The Pacific Northwest Area for purposes of these determinations shall be Oregon, Washington, Idaho and Montana west of the Continental Divide but shall exclude areas served on the ratification date by the California Oregon Power Company and Utah Power and Light Company.

Step I

The system for the period covered by the estimate will consist of the Canadian storage, the United States base system, any thermal installation operated in coordination with the base system, and additional hydroelectric projects which will provide storage releases usable by the base system or which will use storage releases that are usable by the base system. The installations included in this system will be those required, with allowance for adequate reserves, to meet the forecast power load to be served by this system in the United States of America, including the estimated flow of power at points of inter-connection with adjacent areas, subject to paragraph 3, plus the portion of the entitlement of Canada that is expected to be used in Canada. The capability of this system to supply this load will be determined on the basis that the system will be operated in accordance with the established operating procedures of each of the projects involved.

Step II

A determination of the energy capability will be made using the same thermal installation as in Step I, the United States base system with the same installed capacity as in Step I and Canadian storage.

Step III

A similar determination of the energy capability will be made using the same thermal installation as in Step I and the United States base system with the same installed capacity as in Step I.

8. The downstream power benefits to be credited to Canadian storage will be the differences between the determi-

nations in Step II and Step III in dependable hydroelectric capacity and in average annual usable hydroelectric energy, made in accordance with paragraphs 2 and 3.

ANNEX B - TABLE - BASE SYSTEM

Project	Stream	Stream Mile Above Mouth	Usable Storage Acre-feet	Normal Elevation Pool Feet	Normal Elevation Tailwater Feet	Gross Head Feet	Initial Installation No. of Units	Initial Installation Plant Kilowatts (Nameplate)	Estimated Ultimate Installation No. of Units	Estimated Ultimate Installation Plant Kilowatts (Nameplate)
Hungry Horse	S. Fk. Flathead	5	3,161,000(4)	3560	3083	477	4	285,000	4	285,000
[illegible]	Flathead	73	1,219,000	2893	2706	187	3	168,000	3	168,000
Thompson Falls	Clark Fork	209	Pondage	2396	2336	60	6	30,000	8	65,000
Noxon Rapids	Clark Fork	170	Pondage	2331	2179	152	4	336,000	5	420,000
Cabinet Gorge	Clark Fork	150	Pondage	2175	2078	97	4	200,000	6	300,000
Albeni Falls	Pend Oreille	90	1,155,000	2062	2034	28	3	42,600	3	42,600
Box Canyon	Pend Oreille	34	Pondage	2031	1989	42	4	60,000	4	60,000
Grand Coulee	Columbia	597	5,232,000(4)	1290(3)(4)	947	343	18	1,944,000	34	3,672,000
Chief Joseph	Columbia	546	Pondage	946	775	171	16	1,024,000	27	1,728,000
Wells(1)	Columbia	516	Pondage	775	707	68	6	400,000	10	666,700
Rocky Reach	Columbia	474	Pondage	707	614	93	7	711,550	11	1,118,150
Rock Island	Columbia	453	Pondage	608(3)	570	38	10	212,100	10	212,100
Wanapum	Columbia	415	Pondage	570	486	84	10	831,250	16	1,330,000
Priest Rapids	Columbia	397	Pondage	486	406	80	10	788,500	16	1,261,600
Brownlee	Snake	285	974,000	2077	1805	272	4	360,400	6	540,600
Oxbow	Snake	273	Pondage	1805	1683	122	4	190,000	5	237,500
Ice Harbor	Snake	10	Pondage	440	343	97	3	270,000	6	540,000
McNary	Columbia	292	Pondage	340	265	75	14	980,000	20	1,400,000
John Day	Columbia	216	Pondage	265	161	104	8	1,080,000	20	2,700,000
The Dalles	Columbia	192	Pondage	160	74	86	16(2)	1,119,000	24(2)	1,743,000
Roneville	Columbia	145	Pondage	74	15	59	10	518,400	16	890,400
Kootenay Lake	Kootenay	16	673,000	1745	-	-	-	-	-	-
Chelan	Chelan	0	676,000	1100	707	393	2	48,000	4	96,000
Coeur d'Alene L.	Coeur d'Alene	102	221,000	2128	-	-	-	-	-	-
TOTAL 24 PROJECTS			13,313,000(4)			3128	166	11,598,800	258	19,476,650

(1) The Wells project is not presently under construction; when this project or any other project on the main stem of the Columbia River is completed, they will be integral components of the base system.
(2) Includes two 13,500 kilowatt units for fish attraction water.
(3) With flashboards.
(4) In determining the base system capabilities with and without Canadian storage the Hungry Horse reservoir storage will be limited to 3,008,000 acre-feet (normal full pool elevation of 3560 feet) and the Grand Coulee project will not include the effect of adding flashboards, limiting the storage to 5,072,000 acre-feet (normal full pool elevation of 1288 feet) The total usable storage of the base system as so adjusted will be 13,000,000 acre-feet.

BEST AVAILABLE COPY

WHEREAS the Senate of the United States of America by their resolution of March 16, 1961, two-thirds of the Senators present concurring therein, did advise and consent to the ratification of the aforesaid treaty;

WHEREAS the aforesaid treaty was duly ratified by the President of the United States of America on March 23, 1961, in pursuance of the aforesaid advice and consent of the Senate, and was duly ratified on the part of Canada;

WHEREAS it is provided in Article XIX of the aforesaid treaty that the treaty shall come into force on the ratification date and in Article XX of the aforesaid treaty that the instruments of ratification shall be exchanged at Ottawa;

AND WHEREAS the respective instruments of ratification of the aforesaid treaty were duly exchanged at Ottawa on September 16, 1964 by the respective Plenipotentiaries of the United States of America and Canada;

NOW, THEREFORE, be it known that I, Lyndon B. Johnson, President of the United States of America, do hereby proclaim and make public the aforesaid treaty to the end that the said treaty and each and every article and clause thereof may be observed and fulfilled, on and after September 16, 1964, with good faith by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the International Peace Arch, Blaine, Washington, this sixteenth day of September in the year of our Lord one thousand nine hundred sixty-four and of the Independence of the United States of America the one hundred eighty-ninth.

[Seal Omitted]

LYNDON B. JOHNSON

By the President:
DEAN RUSK
Secretary of State

The Canadian Secretary of State for External Affairs to the Secretary of State

THE SECRETARY OF STATE FOR EXTERNAL AFFAIRS

CANADA

January 22, 1964

SIR,

I have the honour to refer to discussions which have been held between representatives of the Government of Canada and of the Government of the United States of America regarding the Treaty between Canada and the United States of America relating to cooperative development of the water resources of the Columbia River Basin signed at Washington on January 17, 1961. On the basis of these discussions, the Government of Canada understands that the two Governments have agreed to the terms of the attached Protocol.

I should like to propose that, if agreeable to your Government, this Note together with the Protocol attached thereto and your reply, shall constitute an agreement between our two Governments relating to the carrying out of the provisions of the Treaty with effect from the date of the exchange of instruments of ratification of the Treaty.

Accept, Sir, the renewed assurances of my highest consideration.

PAUL MARTIN
Secretary of State
for External Affairs

The Honourable
DEAN RUSK,
Secretary of State of the
United States of America,
Washington.

ANNEX TO EXCHANGE OF NOTES DATED JANUARY 22, 1964 BETWEEN THE GOVERNMENTS OF CANADA AND THE UNITED STATES REGARDING THE COLUMBIA RIVER TREATY

PROTOCOL

1. If the United States entity should call upon Canada to operate storage in the Columbia River Basin to meet flood control needs of the United States of America pursuant to Article IV(2)(b) or Article IV(3) of the Treaty, such call shall be made only to the extent necessary to meet forecast flood control needs in the territory of the United States of America that cannot adequately be met by flood control facilities in the United States of America in accordance with the following conditions:

(1) Unless otherwise agreed by the Permanent Engineering Board, the need to use Canadian flood control facilities under Article IV(2)(b) of the Treaty shall be considered to have arisen only in the case of potential floods which could result in a peak discharge in excess of 600,000 cubic feet per second at The Dalles, Oregon, assuming the use of all related storage in the United States of America existing and under construction in January 1961, storage provided by any dam constructed pursuant to Article XII of the Treaty and the Canadian storage described in Article IV(2)(a) of the Treaty.

(2) The United States entity will call upon Canada to operate storage under Article IV(3) of the Treaty only to control potential floods in the United States of America that could not be adequately controlled by all the related storage facilities in the United States of America existing at the expiration of 60 years from the ratification date but in no event shall Canada be required to provide any greater degree of flood control under Article IV(3) of the Treaty than that provided for under Article IV(2) of the Treaty.

(3) A call shall be made only if the Canadian entity has been consulted whether the need for flood control is, or is likely to be, such that it cannot be met by the use of flood control facilities in the United States of America in accordance with subparagraphs (1) or (2) of this paragraph. Within ten days of receipt of a call, the Canadian entity will communicate its acceptance, or its rejection or proposals for modification of the call, together with supporting considerations. When the communication indicates rejection or modification of the call the United States entity will review the situation in the light of the communication and subsequent developments and will then withdraw or modify the call if practicable. In the absence of agreement on the call or its terms the United States entity will submit the matter to the Permanent Engineering Board provided for under Article XV of the Treaty for assistance as contemplated in Article XV(2)(c) of the Treaty. The entities will be guided by any instructions issued by the Permanent Engineering Board. If the Permanent Engineering Board does not issue instructions within ten days of receipt of a submission the United States entity may renew the call for any part or all of the storage covered in the original call and the Canadian entity shall forthwith honour the request.

2. In preparing the flood control operating plans in accordance with paragraph 5 of Annex A of the Treaty, and in making calls to operate for flood control pursuant to Article IV(2)(b) and Article IV(3) of the Treaty, every effort will be made to minimize flood damage both in Canada and the United States of America.

3. The exchange of Notes provided for in Article VIII(1) of the Treaty shall take place contemporaneously with the exchange of the Instruments of Ratification of the Treaty provided for in Article XX of the Treaty.

4.(1) During the period and to the extent that the sale of Canada's entitlement to downstream power benefits within the United States of America as a result of an

exchange of Notes pursuant to Article VIII(1) of the Treaty relieves the United States of America of its obligation to provide east-west standby transmission service as called for by Article X(1) of the Treaty, Canada is not required to make payment for the east-west standby transmission service with regard to Canada's entitlement to downstream power benefits sold in the United States of America.

(2) The United States of America is not entitled to any payments of the character set out in subparagraph (1) of this paragraph in respect of that portion of Canada's entitlement to downstream power benefits delivered by the United States of America to Canada at any point on the Canada-United States of America boundary other than at a point near Oliver, British Columbia, and the United States of America is not required to provide the east-west standby transmission service referred to in subparagraph (1) of this paragraph in respect of the portion of Canada's entitlement to downstream power benefits which is so delivered.

5. Inasmuch as control of historic streamflows of the Kootenay River by the dam provided for in Article XII(1) of the Treaty would result in more than 200,000 kilowatt years per annum of energy benefit downstream in Canada, as well as important flood control protection to Canada, and the operation of that dam is therefore of concern to Canada, the entities shall, pursuant to Article XIV(2)(a) of the Treaty, cooperate on a continuing basis to coordinate the operation of that dam with the operation of hydroelectric plants on the Kootenay River and elsewhere in Canada in accordance with the provisions of Article XII(5) and Article XII(6) of the Treaty.

6.(1) Canada and the United States of America are in agreement that Article XIII(1) of the Treaty provides to each of them a right to divert water for a consumptive use.

(2) Any diversion of water from the Kootenay River when once instituted under the provisions of Article XIII of the Treaty is not subject to any limitation as to time.

7. As contemplated by Article IV(1) of the Treaty, Canada shall operate the Canadian storage in accordance with Annex A and hydroelectric operating plans made thereunder. Also, as contemplated by Annexes A and B of the Treaty and Article XIV(2)(k) of the Treaty, these operating plans before they are agreed to by the entities will be conditioned as follows:

(1) As the downstream power benefits credited to Canadian storage decrease with time, the storage required to be operated by Canada pursuant to paragraphs 6 and 9 of Annex A of the Treaty, will be that required to produce those benefits.

(2) The hydroelectric operating plans, which will be based on Step I of the studies referred to in paragraph 7 of Annex B of the Treaty, will provide a reservoir-balance relationship for each month for the whole of the Canadian storage committed rather than a separate relationship for each of the three Canadian storages. Subject to compliance with any detailed operating plan agreed to by the entities as permitted by Article XIV(2)(k) of the Treaty, the manner of operation which will achieve the specific storage or release of storage called for in a hydroelectric operating plan consistent with optimum storage use will be at the discretion of the Canadian entity.

(3) Optimum power generation at-site in Canada and downstream in Canada and the United States of America referred to in paragraph 7 of Annex A of the Treaty will include power generation at-site and downstream in Canada of the Canadian storages referred to in Article II(2) of the Treaty, power generation in Canada which is coordinated therewith, downstream power benefits from the Canadian storage which are produced in the United States of

America and measured under the terms of Annex B of the Treaty, power generation in the Pacific Northwest Area of the United States of America and power generation coordinated therewith.

8. The determination of downstream power benefits pursuant to Annex B of the Treaty, in respect of each year until the expiration of thirty years from the commencement of full operation in accordance with Article IV of the Treaty of that portion of the Canadian storage described in Article II of the Treaty which is last placed in full operation, and thereafter until otherwise agreed upon by the entities, shall be based upon stream flows for the thirty-year period beginning July 1928 as contained in the report entitled "Extension of Modified Flows Through 1958 – Columbia River Basin" and dated June 1960, as amended and supplemented to June 29, 1961, by the Water Management Subcommittee of the Columbia Basin Inter-Agency Committee.

9.(1) Each load used in making the determinations required by Steps II and III of paragraph 7 of Annex B of the Treaty shall have the same shape as the load of the Pacific Northwest area as that area is defined in that paragraph.

(2) The capacity credit of Canadian storage shall not exceed the difference between the firm load carrying capabilities of the projects and installations included in Step II of paragraph 7 of Annex B of the Treaty and the projects and installations included in Step III of paragraph 7 of Annex B of the Treaty.

10. In making all determinations required by Annex B of the Treaty the loads used shall include the power required for pumping water for consumptive use into the Banks Equalizing Reservoir of the Columbia Basin Federal Reclamation Project but mention of this particular load is not intended in any way to exclude from those loads any use of power that would normally be part of such loads.

11. In the event operation of any of the Canadian storages is commenced at a time which would result in the United

States of America receiving flood protection for periods longer than those on which the amounts of flood control payments to Canada set forth in Article VI(1) of the Treaty are based, the United States of America and Canada shall consult as to the adjustments, if any, in the flood control payments that may be equitable in the light of all relevant factors. Any adjustment would be calculated over the longer period or periods on the same basis and in the same manner as the calculation of the amounts set forth in Article VI(1) of the Treaty. The consultations shall begin promptly upon the determination of definite dates for the commencement of operation of the Canadian storages.

12. Canada and the United States of America are in agreement that the Treaty does not establish any general principle or precedent applicable to waters other than those of the Columbia River Basin and does not detract from the application of the Boundary Waters Treaty, 1909, to other waters.

The Secretary of State to the Canadian Secretary of State for External Affairs

DEPARTMENT OF STATE
WASHINGTON
January 22, 1964

SIR:

I have the honor to refer to your note dated January 22, 1964, together with the Annex thereto regarding the Treaty between Canada and the United States of America relating to cooperative development of the water resources of the Columbia River Basin signed at Washington on January 17, 1961.

I wish to advise you that the Government of the United States of America agrees that your note with the Annex thereto, together with this reply, shall constitute an agreement between our two Governments relating to the carrying out of the provisions of the Treaty with effect from the date of the exchange of instruments of ratification of the Treaty.

Accept, Sir, the renewed assurances of my highest consideration.

DEAN RUSK

The Honorable
PAUL MARTIN, P.C., Q.C.,
Secretary of State for External Affairs,
Ottawa.

DEPARTMENT OF STATE
WASHINGTON
January 22, 1964

SIR:

I have the honor to refer to the discussions which have been held between representatives of the Government of Canada and of the Government of the United States of America regarding a sale of Canada's entitlement to downstream power benefits under the Treaty between Canada and the United States of America relating to cooperative development of the water resources of the Columbia River Basin, signed on January 17, 1961.

On the basis of these discussions my Government understands that the two Governments recognize that it would be in the public interest of both countries if Canada's entitlement to downstream power benefits could be disposed of, as contemplated by Article VIII of the Treaty, in accordance with general conditions and limits similar to those set out in detail in the attachment hereto, and further, that before such a disposition can be concluded and confirmed by the two Governments, additional steps must be taken in each country. Therefore, in furtherance of this aim, it is understood the two Governments are agreed that:

a) the Government of the United States will use its best efforts to arrange for disposition of Canada's entitlement to downstream power benefits within the United States of America in accordance with the general conditions and limits set forth in the attachment, and

b) the Government of Canada will use its best efforts to accomplish all those things which are considered necessary and preliminary to ratification of the Treaty as quickly as possible, including any arrangements for implementation and acceptance of the general conditions and limits set forth in the attachment.

I should like to propose that if agreeable to your Government this note together with the attachment and your reply shall constitute an agreement by our Governments relating to the Treaty.

Accept, Sir, the renewed assurances of my highest consideration.

DEAN RUSK

The Honorable
PAUL MARTIN, P.C., Q.C.,
Secretary of State for External Affairs,
Ottawa

ATTACHMENT RELATING TO TERMS OF SALE

A. The disposition shall consist of the downstream power benefits to which Canada is entitled under the Treaty, other than Canada's entitlement to downstream power benefits resulting from the construction or operation of a project described in Article IX of the Treaty, and shall be by way of a contract of sale authorized in accordance with Article VIII of the Treaty between the British Columbia Hydro and Power Authority and a single Purchaser containing provisions mutually satisfactory to the parties to the contract but shall be subject to and be operative in accordance with the following general conditions and limits:

1. (a) The storages described in Article II of the Treaty shall be fully operative for power purposes in accordance with the following schedule:

Storage described in Article II(2)(c) – approximately 1,400,000 acre feet on April 1, 1968,

Storage described in Article II(2)(b) – approximately 7,100,000 acre feet on April 1, 1969,

Storage described in Article II(2)(a) – approximately 7,000,000 acre feet on April 1, 1973.

(b) The period of sale of the entitlement allocated to each of the storages shall terminate and expire thirty years from the date on which that storage is required to be fully operative for power purposes in accordance with the schedule in subparagraph (a) of this paragraph.

(c) In the event any storage is not fully operative in accordance with the schedule in subparagraph (a) of this paragraph or if, during the period of sale, the storage is not operated as required by the hydroelectric operating plans agreed upon in accordance with the Treaty, as modified by any detailed operating plan agreed upon in accordance with Article XIV(2)(k) of

the Treaty, and the Canadian entitlement is thereby reduced, the British Columbia Hydro and Power Authority shall pay the Purchaser an amount equal to the cost it would have to incur to replace that part of the reduction in the Canadian entitlement which the vendees of the Purchaser could have used other than costs that could have been avoided had every reasonable effort to mitigate losses been made by the Purchaser, the United States entity and the owners of non-federal dams on the Columbia River in the United States of America. Alternatively, the British Columbia Hydro and Power Authority may, at its option, supply power to the Purchaser in an amount which assures that the Purchaser receives the capacity and energy which would have constituted that part of the reduction in the Canadian entitlement that the vendees of the Purchaser could have used if there had been no default, together with appropriate adjustments to reflect transmission costs in the United States of America, delivery to be made when the loss of power would otherwise have occurred.

If the assurance described in paragraph B.5. of this attachment is given to the Purchaser, the United States entity may succeed to all the rights of the Purchaser and its vendees to receive the entire Canadian entitlement, or that part that could be used by the vendees, and to be compensated by British Columbia Hydro and Power Authority in the event of non-receipt thereof. The United States entity agrees that before it purchases more costly power from any third party for the purpose of supplying the necessary amount of the Canadian entitlement to the Purchaser, it will first cause to be delivered to the Purchaser, or for

its account, any available surplus capacity or energy from the United States Federal Columbia River System and compensation to the United States entity because of such deliveries shall be computed by applying the then applicable rate schedules of the Bonneville Power Administration to the deliveries.

In the event of disagreement, determination of compensation in money or power due under this paragraph shall be resolved by arbitration and shall be confined to the actual loss incurred in accordance with the principles in this paragraph.

(d) For the purpose of allocating downstream power benefits among the Treaty storages from April 1, 1998 to April 1, 2003, the percentage of downstream power benefits allocated to each Treaty storage shall be the percentage of the total of the Treaty storages provided by that storage.

2. For the period of the sale the British Columbia Hydro and Power Authority shall operate and maintain the Treaty storages in accordance with the provisions of the Treaty.

3. (a) The purchase price of the entitlement shall be $254,400,000, in United States funds as of October 1, 1964, subject to adjustment, in the event of an earlier payment of all or part thereof, to the then present worth, at a discount rate of 4 1/2 percent per annum.

(b) The purchase price shall be paid to Canada contemporaneously with the exchange of ratifications of the Treaty and shall be applied towards the cost of constructing the Treaty projects through a transfer of the purchase price by Canada to the Government of British Columbia, pursuant to arrangements deemed satisfactory to Canada, to be entered into between

Canada and the Government of British Columbia.

4. If, during the period of the sale, there is any reduction in Canada's entitlement to downstream power benefits which results from action taken by the Canadian entity pursuant to paragraph 7 of Annex A of the Treaty, the British Columbia Hydro and Power Authority shall, by supplying power to the Purchaser, or otherwise as may be agreed, offset that reduction in a manner so that the Purchaser will be compensated therefor.

5. The Purchaser shall have and may exercise the rights of the British Columbia Hydro and Power Authority relating to the negotiation and conclusion with the United States entity, of proposals relating to the exchanges authorized by Article VIII(2) of the Treaty with respect to any portion of Canada's entitlement to downstream power benefits sold to the Purchaser.

B. The Notes to be exchanged pursuant to Article VIII(1) of the Treaty shall contain, inter alia, provisions incorporating the following requirements:

1. As soon as practicable after start of construction of each Treaty project the Canadian and United States entities shall agree upon a program for filling the storage provided by the project. The filling program shall have the objective of having the storages described in Article II(2)(c) and Article II(2)(b) of the Treaty full by September 1 following the date when the storages become fully operative and the storage provided by the dam mentioned in Article II(2)(a) of the Treaty full to 15 million acre-feet by September 1, 1975. This objective shall be reflected in the hydroelectric operating plans and shall take into account generating requirements at-site and downstream in Canada and the United States of America to meet loads.

2. In the event the United States of America becomes entitled to compensation in respect of a breach of the obligation under Article IV(6) of the Treaty to commence full operation of a storage, compensation payable to the United States of America under Article XVIII(5)(a) of the Treaty shall be made in an amount equal to 2.70 mills per kilowatt-hour, and 46 cents per kilowatt of dependable capacity for each month or fraction thereof, in United States funds, for and in lieu of the power which would have been forfeited under Article XVIII(5)(a) of the Treaty if Canada's entitlement to downstream power benefits had not been sold in the United States of America. Alternatively, Canada may, at its option, supply capacity and energy to the United States entity in an amount equal to that which would have been forfeited, together with appropriate adjustments to reflect transmission costs in the United States of America, delivery to be made when the loss would otherwise have occurred.

3. A diminution of Canada's entitlement to downstream power benefits sold in the United States of America which is directly attributable to a failure to comply with paragraph A.1(a) or paragraph A.2 of this attachment, in the absence of compensation therefor by the British Columbia Hydro and Power Authority, constitutes a breach of the Treaty by Canada and Article XVIII(5) of the Treaty and the exculpatory provisions in Article XVIII of the Treaty do not apply to such breach. Compensation or replacement of power as specified in paragraph A.1(c) of this attachment shall be made by Canada and shall be accepted by the United States of America as complete satisfaction of Canada's liability under this paragraph.

4. For any year in which Canada's entitlement to downstream power benefits is sold in the United

States of America, the United States entity may decide the amount of the downstream power benefits for purposes connected with the disposition thereof in the United States of America. This authorization, however, shall not affect the rights or relieve the obligations of the Canadian and United States entities relating to joint activities under the provisions of Article XIV and Annexes A and B of the Treaty; nor shall it apply to determination of compensation provided for in paragraph A.1(c) and paragraph B.2 of this attachment.

5. If necessary to accomplish the sale of Canada's entitlement to downstream power benefits in accordance with this attachment, the United States entity shall assure unconditionally the delivery to or for the account of the Purchaser, by appropriate exchange contracts, of an amount of power agreed between the United States entity and the Purchaser to be the equivalent of the entitlement during the period of the sale.

C. Canada shall designate the British Columbia Hydro and Power Authority as the Canadian entity for the purposes of Article XIV(1) of the Treaty.

The Canadian Secretary of State for External Affairs to the Secretary of State

THE SECRETARY OF STATE FOR EXTERNAL AFFAIRS
CANADA
January 22, 1964

SIR,

I have the honour to refer to your Note dated January 22, 1964, together with the attachment thereto regarding the Treaty between Canada and the United States of America relating to cooperative development of the water resources of the Columbia River Basin signed at Washington on January 17, 1961.

I wish to advise you that the Government of Canada agrees that your Note with the attachment thereto, together with this reply, shall constitute an agreement between our two Governments relating to the Treaty.

Accept, Sir, the renewed assurances of my highest consideration.

PAUL MARTIN
Secretary of State
for External Affairs

The Honourable
DEAN RUSK,
Secretary of State of the
United States of America,
Washington.

The Canadian Secretary of State for External Affairs to the American Ambassador

DEPARTMENT OF EXTERNAL AFFAIRS
CANADA
OTTAWA, *September 16, 1964*

No. 140

EXCELLENCY,

I have the honour to refer to the Treaty between Canada and the United States of America relating to cooperative development of the water resources of the Columbia River Basin signed at Washington on 17 January 1961, to the Protocol attached to my Note to the Honourable Dean Rusk, Secretary of State of the United States of America, dated 22 January 1964, and to the exchange of instruments of ratification of the Treaty which occurred today.

I also have the honour to refer to the discussions which have been held between representatives of the Government of Canada and of the Government of the United States of America in connection with the Exchange of Notes, dated 22 January 1964, regarding sale in the United States of America of Canada's entitlement under the Treaty to downstream power benefits.

My Government also understands that your Government has designated the Administrator of the Bonneville Power Administration, Department of the Interior, and the Division Engineer, North Pacific Division, Corps of Engineers, Department of the Army, as the United States Entity for the purposes of Article XIV(1) of the Treaty, and I would inform you that the Government of Canada has designated the British Columbia Hydro and Power Authority, a corporation incorporated in the Province of British Columbia by the British Columbia Hydro and Power Authority Act, 1964, as the Canadian Entity for the purposes of that Article. A copy of the designation is attached hereto.

On the basis of those discussions the Government of Canada proposes that the Canadian Entitlement Purchase

Agreement regarding the sale in the United States of America of the Canadian Entitlement under the Treaty to downstream power benefits entered into between the British Columbia Hydro and Power Authority and the Columbia Storage Power Exchange, the single purchaser referred to in the attachment to your Note of January 22, 1964, relating to the terms of the sale, a copy of which agreement is attached hereto, be authorized for the purposes of Article VIII(1) of the Treaty as a disposal of the Canadian Entitlement in the United States of America for the period and in accordance with the other terms and provisions set out in the Canadian Entitlement Purchase Agreement.

My Government also understands that your Government pursuant to paragraph E.5 in the attachment to Mr. Secretary Rusk's Note of January 22, 1964, relating to the terms of the sale, has determined that the United States Entity shall enter into and that it has entered into the Canadian Entitlement Exchange Agreements which agreements assure unconditionally the delivery for the account of the Columbia Storage Power Exchange of an amount of power agreed between the United States Entity and the Columbia Storage Power Exchange to be the equivalent of the Canadian Entitlement being sold under the Canadian Entitlement Purchase Agreement, and that the United States Entity has succeeded to all the rights and obligations of the Columbia Storage Power Exchange under the Canadian Entitlement Purchase Agreement other than the obligation to pay the purchase price, and further that the United States Entity has, pursuant to Article XI of the Treaty, approved the use of the improved stream flow in the United States of America brought about by the Treaty by entering into Canadian Entitlement Allocation Agreements with owners of non-Federal dams on the Columbia River.

My Government also understands that the two Governments are agreed that the Government of the United States of America undertakes that:

(1) So long as the Canadian Entitlement Exchange Agreements remain in force, the United States Entity will perform all the obligations of the Columbia Storage Power Exchange under the Canadian Entitlement Purchase Agreement other than the obligation to pay the purchase price specified in Section 3 of the Canadian Entitlement Purchase Agreement;

(2) In the event the Canadian Entitlement is reduced as a result of a failure on the part of the Canadian Entity to comply with Section 4 of the Canadian Entitlement Purchase Agreement and if the failure results other than from wilful omission by the Canadian Entity to fulfill its obligations under that agreement, the United States Entity will, without compensation, offset the effect of that failure by adjusting the operation of the portion of the System described in Step I of paragraph 7 of Annex B of the Treaty which is in the United States of America to the extent that the United States Entity can do so without loss of energy or capacity to that portion of the System; and

(3) If the procedure described in paragraph (2) above does not fully offset the effect of the failure, then to the extent the entities agree thereon, an additional offsetting adjustment in the operation of the portion of the System described in Step I of Annex B of the Treaty which is in the United States of America and which would result in only an energy loss will be made if the Canadian Entity delivers to the United States Entity energy sufficient to make up one half that energy loss.

(4) In order to make up any reduction in the Canadian Entitlement, which reduction is to be determined in accordance with Section 6 of the Canadian Entitlement Purchase Agreement, the United States Entity will cause to be delivered the least expensive capacity and energy available and, to the ex-

tent that it would be the least expensive available, will deliver, at the then applicable rate schedules of the Bonneville Power Administration, any available surplus capacity and energy from the United States Federal Columbia River System.

The Government of Canada also proposes that:

(5) Contemporaneously with the exchange of the instruments of ratification CSPE shall have paid to Canada the sum in United States funds of $253,929,534.25, being the equivalent of the sum of $254,400,000 in United States funds as of October 1, 1964 adjusted to September 16, 1964 at a discount rate of 4 1/2 percent per annum on the basis set out in the January 22, 1964 Exchange of Notes between our two Governments relating to the terms of sale, which sum shall be applied towards the cost of constructing the Treaty projects through a transfer of the sum by Canada to the Government of British Columbia pursuant to arrangements entered into between Canada and British Columbia.

(6) No modification or renewal of the Canadian Entitlement Purchase Agreement shall be effective until approved by the Governments of Canada and the United States of America, evidenced by an Exchange of Notes.

(7) The storages described in Article II of the Treaty shall be considered fully operative when the facilities for such storages are available and outlet facilities are operable for regulating flows in accordance with the flood control and hydroelectric operating plans.

(8) As soon as practicable, the Canadian and United States Entities shall agree upon a program for filling the storage provided by each of the Treaty projects. The filling program shall have the objective of having the storages described in Article II(2)(a), Article II(2)(b), and Article II(2)(c) of the Treaty

filled to the extent that usable storage, in the amounts provided for each storage in Article II of the Treaty is available by September 1 following the date when the storage becomes fully operative, and of having the storage provided by the dam described in Article II(2)(a) filled to 15 million acre-feet by September 1, 1975. This objective shall be reflected in the hydroelectric operating plans and shall take into account generating requirements at-site and downstream in Canada and the United States of America to meet loads and requirements for flood control.

(9) In the event the United States of America becomes entitled to compensation from Canada for loss of downstream power benefits, other than Canada's entitlement to downstream power benefits, in respect of a breach of the obligation under Article IV(6) of the Treaty to commence full operation of a storage, compensation payable to the United States of America under Article XVIII(5)(a) of the Treaty shall be made in an amount equal to 2.70 mills per kilowatt-hour of energy, and 46 cents per kilowatt of dependable capacity for each month or fraction thereof, in United States Funds, for and in lieu of the power which would have been forfeited under Article XVIII(5)(a) of the Treaty if Canada's entitlement to downstream power benefits had not been sold in the United States of America. The power which would have been forfeited shall be Canada's entitlement to downstream power benefits attributable to the particular storage had it commenced full operation in accordance with Article IV(6) of the Treaty and shall consist of (1) dependable capacity for the period of forfeiture and (2) that portion of average annual usuable energy which would have been available during the period of forfeiture assuming the energy to be available at a uniform rate throughout the year. Alternatively,

Canada may, at its option, offset the power for which compensation is to be made by delivering capacity and energy to the United States Entity, such delivery to be made, unless otherwise agreed by the entities, during the period of breach and at a uniform rate. The option for Canada to provide power in place of paying money shall permit Canada to make compensation partly by supplying power and partly by paying money, as may be mutually agreed by the entities.

(10) The Canadian Entity shall at reasonable intervals provide current reports to the United States Entity of the progress of construction of the Treaty storages. In the event there is a likelihood of delay in meeting the completion dates set out in Section 4 of the Canadian Entitlement Purchase Agreement or a delay which will give rise to a claim under paragraph (9) hereof the Canadian Entity will advise of the probability of power being available to make the compensation required.

(11) To the extent the Canadian Entity does not make compensation for a reduction in the Canadian Entitlement arising as a result of a failure to comply with Section 4 of the Canadian Entitlement Purchase Agreement, Canada shall make such compensation and such compensation shall be accepted in complete satisfaction of all claims arising out of the failure in respect of the reduction in the Canadian Entitlement for which such compensation was made.

(12) For any year in which Canada's Entitlement to downstream power benefits is sold to Columbia Storage Power Exchange, the United States Entity may decide the amount of the downstream power benefits for purposes connected with the disposition thereof in the United States of America. This authorization, however, shall neither affect the rights or relieve the obligations of the Canadian

and United States Entities relating to joint activities under the provisions of Article XIV and Annexes A and B of the Treaty, nor shall it apply to determination of compensation provided for in the Canadian Entitlement Purchase Agreement or pursuant to paragraph (9) hereof or to determination of the power benefits to which Canada is entitled.

(13) Any power delivered by the Canadian Entity or by Canada in accordance with the Canadian Entitlement Purchase Agreement or this Note shall be delivered at points of interconnection on the Canadian-United States border mutually acceptable to the entities. Appropriate adjustments shall be made to reflect transmission costs and transmission losses in the United States of America.

(14) Any dispute arising under the Canadian Entitlement Purchase Agreement, including, but without limitation, a dispute whether any event requiring compensation has occurred, the amount of compensation due or the amount of any overdelivery of power is agreed to be a difference under the Treaty to be settled in accordance with the provisions of Article XVI of the Treaty, and the parties to the Canadian Entitlement Purchase Agreement may avail themselves of the jurisdiction hereby conferred.

The Government of Canada therefore proposes that if agreeable to your Government this Note together with your reply thereto constitutes an agreement by our Governments relating to the Treaty with effect from the date of the exchange of instruments of ratification of the Treaty.

Accept, Excellency, the renewed assurances of my highest consideration.

PAUL MARTIN
Secretary of State
for External Affairs

His Excellency,
W. WALTON BUTTERWORTH,
Ambassador of the United States
of America,
Ottawa.

P.C. 1964-1407

Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 4th September, 1964.

CANADA
PRIVY COUNCIL

The Committee of the Privy Council, on the recommendation of the Right Honourable Lester B. Pearson, the Prime Minister, advise that Your Excellency may be pleased to designate the British Columbia Hydro and Power Authority, a corporation incorporated in the Province of British Columbia by the British Columbia Hydro and Power Authority Act 1964, as the Canadian entity for the purposes of Article XIV of a treaty dated January 17, 1961 at Washington, D.C. U.S.A. between Canada and the United States of America relating to co-operative development of the water resources of the Columbia River Basin, such designation to take effect on the date on which the Instruments of Ratification of the Treaty shall be exchanged.

/s/ [Illegible]
CLERK OF THE PRIVY COUNCIL

CANADIAN ENTITLEMENT PURCHASE AGREEMENT

This Agreement executed this thirteenth day of August, 1964, by and between COLUMBIA STORAGE POWER EXCHANGE, a nonprofit corporation organized under the laws of the State of Washington, hereinafter referred to as "CSPE",

and

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY, a corporation incorporated in the Province of British Columbia, Canada, by the British Columbia Hydro and Power Authority Act, 1964, hereinafter referred to as "the Authority".

WHEREAS:

A. The Governments of the United States of America and Canada are exchanging instruments of ratification of the Treaty Between Canada and the United States of America Relating to the Cooperative Development of the Water Resources of the Columbia River Basin Signed at Washington January 17, 1961. By an Exchange of Notes dated January 22, 1964, the two Governments agreed upon the terms of a Protocol with effect from the date of the exchange of instruments of ratification of the Treaty aforesaid (which Treaty and Protocol are hereinafter referred to as the "Treaty").

B. Under the terms of the Treaty, Canada is entitled to receive from the United States one half of the annual average usable energy and one half of the dependable hydroelectric capacity which can be realized in the United States each year as a result of use of the improved stream flow on the Columbia River created by storage to be constructed in Canada.

C. The Government of Canada and the Government of British Columbia have entered into an agreement dated 8 July, 1963, and a supplementary agreement dated 13 January, 1964, wherein it was agreed that all proprietary rights, title and interests arising under the Treaty, including all rights to downstream power benefits, belong to the

Government of British Columbia, and providing that Canada shall designate the Authority as the Canadian Entity as provided for in Article XIV of the Treaty. Pursuant to such agreement Canada is designating the Authority as the Canadian Entity.

D. The Authority is, by virtue of an Order in Council of the Province of British Columbia, dated August 7, 1964, required and authorized to exercise all the rights and powers granted to the Canadian Entity and to perform all the obligations imposed on the Canadian Entity by the Treaty and to enter into this Agreement.

E. CSPE is incorporated with the object of purchasing for a term of years Canada's rights to downstream power benefits under the Treaty and incurring indebtedness to finance such purchase and disposing of such rights under such arrangements as may be necessary to retire the corporate indebtedness and to pay the necessary expenses of CSPE incidental thereto.

F. The Governments of the United States of America and Canada, as contemplated by Article VIII of the Treaty and in pursuance of the Agreement of the two Governments contained in an Exchange of Notes dated January 22, 1964, relating thereto, are by an Exchange of Notes authorizing the disposition for a term of years within the United States of America of Canada's rights to downstream power benefits under the Treaty, which disposition when so authorized is to be effectuated by this Agreement in accordance with the provisions of the Treaty and documents supplementary thereto.

NOW, THEREFORE, it is agreed:

SECTION 1. TERM.

This Agreement shall be effective when authorized by the Governments of Canada and the United States of America by an Exchange of Notes pursuant to the Treaty and shall terminate at midnight on March 31, 2003.

SECTION 2. CONVEYANCE.

(1) The Authority does hereby sell, assign, and convey unto CSPE, and CSPE does hereby accept, the entitlement of Canada, as described in Article V(1) of the Treaty, to the downstream power benefits determined in accordance with Article VII of the Treaty, save and except the entitlement of Canada to the downstream power benefits resulting from the construction or operation of the project referred to in Article IX of the Treaty, for the following periods of time:

(a) The benefits resulting from the storage described in Article II(2)(c) of the Treaty (hereinafter referred to as Duncan Lake storage) for a period of 30 years commencing April 1, 1968; and

(b) The benefits resulting from the storage described in Article II(2)(b) of the Treaty (hereinafter referred to as Arrow Lakes storage) for a period of 30 years commencing April 1, 1969; and

(c) The benefits resulting from the storage described in Article II(2)(a) of the Treaty (hereinafter referred to as Mica Creek storage) for a period of 30 years commencing April 1, 1973.

(2) All of the entitlement to the downstream power benefits hereby conveyed for the aforementioned periods of time, without the reductions provided for in paragraph 7 of Annex A of the Treaty is hereinafter referred to as "the Canadian Entitlement".

(3) For the purpose of allocating downstream power benefits among the three Canadian storages provided for in the Treaty between April 1, 1998, and March 31, 2003, the percentage of downstream power benefits allocable to each of the said storages shall be the percentage of the total of the Canadian storages provided by that storage as set out in Article II of the Treaty.

SECTION 3. PAYMENT BY CSPE.

Contemporaneously with the exchange of the instruments of ratification, CSPE is causing to be paid to Can-

ada the sum, in United States funds, of $254,400,000.00 as of October 1, 1964, subject to adjustment in the event of an earlier payment thereof to the then present worth at a discount rate of 4 1/2 percent per annum, which sum shall be applied towards the cost of constructing the Treaty projects through a transfer of the sum by Canada to the Government of British Columbia pursuant to arrangements entered into between Canada and British Columbia. The Authority acknowledges that the receipt by Canada of the said sum is consideration for all the covenants of the authority in this Agreement and particularly the covenants to construct and operate the Treaty projects and is a complete discharge of CSPE for the full purchase price for the sale effected in Section 2 of this Agreement.

SECTION 4. COVENANTS.

(1) The Authority covenants and agrees with CSPE that it will undertake all requisite construction work in a good and workmanlike manner and that the storages described in Article II of the Treaty shall be fully operative for power purposes under this Agreement by the following dates:

(a) The Duncan Lake storage, April 1, 1968.

(b) The Arrow Lakes storage, April 1, 1969.

(c) The Mica Creek storage, April 1, 1973.

To be fully operative the facilities for such storages shall be completed to the extent that storages are available and outlet facilities are operable for regulating flows in accordance with flood control and hydroelectric operating plans as contemplated by the Treaty.

(2) The Authority covenants and agrees with CSPE that it will operate and maintain the Treaty storages in a good and workmanlike manner and in accordance with the provisions of the Treaty and any arrangements made pursuant to the Treaty and that it will not take any action prohibited by the Treaty.

SECTION 5. FLOOD CONTROL.

Nothing in this Agreement affects or alters the obligations, rights, and privileges of the entities under the

Treaty relating to operation and compensation for flood control and without restricting the generality of the foregoing, it is expressly agreed that any reduction in generation in the United States brought about by operation for flood control under the Treaty or any flood control arrangements made pursuant to the Treaty shall not be a reduction in the Canadian Entitlement for which compensation is required under this Agreement.

SECTION 6. COMPENSATION.

In the event the Canadian Entitlement is reduced as a result of a failure to comply with Section 4 of this Agreement:

(1) If the failure results other than from wilful omission by the Authority to fulfill its obligations under this Agreement, the United States Entity has agreed that it will, without compensation, offset the effect of that failure by adjusting the operation of the portion of the system described in Step I of paragraph 7 of Annex B of the Treaty which is in the United States to the extent that the United States Entity can do so without loss of energy or capacity to that portion of the System. If the foregoing procedure does not fully offset the effect of the failure, then to the extent the entities agree thereon, an additional offsetting adjustment in the operation of the portion of the system described in Step I of Annex B of the Treaty which is in the United States and which would result in only an energy loss will be made if the Authority delivers to the United States Entity energy sufficient to make up one half of that energy loss.

(2) If the effect of the failure is not entirely offset by the procedure specified in subsection (1) of this section, the reduction in the Canadian Entitlement shall be deemed to be one half of the difference in dependable hydroelectric capacity and average annual usable energy, capable of being produced by:

(a) the Step II system as specified in Annex B of the Treaty for the year in which the reduction occurs, using the 30 year stream flow record provided for in

Section 8 of the Protocol, with allowance in each of the 30 stream flow years for the effect of the Adjustment made in following the procedure specified in subsection (1) of this section and

(b) the same system for that year with the application of allowance in each of the 30 stream flow years for the effects of the occurrence causing the reduction

and the dependable hydroelectric capacity and average annual usable energy for the purpose of paragraph (b) of this subsection shall be calculated on the basis of an operation for optimum generation in the United States in the light of the offsetting adjustments and in the light of the effects of the occurrence causing the reduction.

(3) If the failure is the result of an occurrence to which the procedure specified in subsection (1) of this section is not applicable, the reduction shall be deemed to be one half of the difference in dependable hydroelectric capacity and average annual usable energy, capable of being produced by:

(a) the Step II system as specified in Annex B of the Treaty for the year in which the reduction occurs, using the 30 year stream flow record provided for in Section 8 of the Protocol, with no allowance for the effects of the occurrence causing the reduction and

(b) the same system for that year with the application of allowance in each of the 30 stream flow years for the effects of the occurrence causing the reduction

and the dependable hydroelectric capacity and average annual usable energy for the purposes of paragraph (b) of this subsection shall be calculated on the basis of an operation for optimum generation in the United States in the light of the effects of the occurrence causing the reduction.

(4) The Authority shall make compensation for reductions in the Canadian Entitlement, which reductions are to be determined in accordance with subsections (2) or (3)

of this section, in amounts equal to the cost of replacing the reductions in the Canadian Entitlement.

(5) The Authority may at its option, and in lieu of the monetary compensation payable under subsection (4) of this section, make compensation by supplying capacity and energy in an amount equal to the reduction in the Canadian Entitlement determined in accordance with subsections (2) or (3) of this section and adjusted to reflect transmission costs in the United States, delivery to be made when the loss would otherwise have occurred. The Authority may provide combinations of money, capacity and energy that are mutually acceptable in discharge of its obligation to make compensation under this section.

(6) The Authority shall give notice as soon as possible after it becomes apparent to it that compensation may be due and will at that time indicate the amounts of capacity and energy which it anticipates it will be able to make available.

(7) The United States Entity has agreed that, in order to make up any reduction in the Canadian Entitlement, it will cause to be delivered the least expensive capacity and energy available and, to the extent that it would be the least expensive, will deliver at the then applicable rate schedules of the Bonneville Power Administration any available surplus capacity and energy from the United States Federal Columbia River System. The cost of replacement referred to in subsection (4) of this section shall be determined as if the reduction was in fact made up as contemplated by the agreement referred to in the preceding sentence.

(8) Compensation made in accordance with this section shall be accepted as satisfaction of all claims against the Authority with respect to the reduction in the Canadian Entitlement for which such compensation was made and with respect to the act or omission of the Authority from which the right to such compensation arose.

(9) Any obligation to mitigate damages by the United States Entity, CSPE, the vendees of CSPE, and the owners

of the non-Federal dams on the Columbia River in the United States is satisfied by compliance with this section.

(10) If the Canadian Entitlement Exchange Agreements referred to in Section 10 are not in force, compensation for a reduction in the Canadian Entitlement in accordance with subsections (2) and (3) of this section, is required only in respect of that part of the reduction in the Canadian Entitlement which CSPE and its vendees could have used and only in respect of costs that could not have been avoided had every reasonable effort to mitigate been made by CSPE and the owners of non-Federal dams on the Columbia River in the United States.

SECTION 7. REDUCTION OF THE CANADIAN ENTITLEMENT IN ACCORDANCE WITH THE TREATY.

Any reduction in the Canadian Entitlement resulting from action taken pursuant to paragraph 7 of Annex A of the Treaty shall be determined in accordance with subsection (3) of Section 6 of this Agreement and unless otherwise agreed, the Authority shall offset the reduction by supplying capacity and energy equal to the reduction, the energy to be supplied in equal monthly amounts.

SECTION 8. SETTLEMENT OF DISPUTES.

Any dispute arising under this Agreement, including but without limitation a dispute as to whether any event requiring compensation has occurred, the amount of compensation due or the amount of any overdelivery of power, is agreed to be a difference under the Treaty to be settled in accordance with the provisions of Article XVI of the Treaty. Any determination of compensation in money or power due shall be confined to the actual loss incurred in accordance with the principles contained in Section 6 of this Agreement.

SECTION 9. EXCHANGES OF CAPACITY AND ENERGY.

(1) The Authority agrees that CSPE shall have and may exercise the rights of the Authority as the Canadian Entity relating to the negotiation and conclusion with the United States Entity of proposals relating to the ex-

changes authorized by Article VIII(2) of the Treaty with respect to any portion of the Canadian Entitlement.

(2) It is agreed that no exchange of capacity for energy or of energy for capacity or modification in the delivery of energy in equal amounts each month as provided in the Treaty shall be taken into account in the determination of compensation to be made by the Authority pursuant to this Agreement.

SECTION 10. EXCHANGE AGREEMENTS.

The Bonneville Power Administrator acting as the Administrator and for and on behalf of the United States Entity has by entering into Canadian Entitlement Exchange Agreements, assured unconditionally the delivery to the vendees of CSPE by appropriate exchange contracts of an amount of power agreed between the United States Entity and CSPE to be the equivalent of the Canadian Entitlement, and the United States Entity, while those Agreements are in force, will succeed to all the rights of CSPE and its vendees to receive the entire Canadian Entitlement and all other rights of CSPE arising from this Agreement. CSPE therefore instructs the Authority, until otherwise notified, to make any compensation whether in power or money required to be made by the Authority pursuant to Section 6 or Section 7 of this Agreement to the United States Entity. CSPE agrees that any settlement of a claim for compensation or arrangement entered into pursuant to this Agreement by the United States Entity shall be binding on CSPE.

SECTION 11. PAYMENTS.

(1) The Authority shall pay any amount in United States funds determined to be due in accordance with the terms hereof within thirty days of receipt of an invoice for such amount.

(2) Should the Authority deliver power in excess of the amount required as compensation, then appropriate adjustments shall be made in kind or in money.

SECTION 12. APPROVALS.

No modification or renewal of this Agreement shall be effective until approved by the Governments of Canada and the United States of America, evidenced by an Exchange of Notes.

SECTION 13. DELIVERIES.

Any power delivered by the Authority pursuant to this Agreement shall be delivered at mutually acceptable points of interconnection on the Canadian-United States border. Appropriate adjustments shall be made to reflect transmission costs and transmission losses in the United States.

SECTION 14. NOTICES.

Any notices shall be in writing and shall be delivered or mailed prepaid as follows:

Columbia Storage Power Exchange,
20 N. Main Street
East Wenatchee, Washington, U.S.A.

United States Entity
c/o Bonneville Power Administration
P. O. Box 3621
Portland, Oregon 97208 U.S.A.

British Columbia Hydro and Power Authority
970 Burrard Street
Vancouver 1, British Columbia, Canada,

or such other address as may be signified by notice to the others.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the day and year first above written.

(SEAL)
Attest

_____

BRITISH COLUMBIA HYDRO
AND POWER AUTHORITY
By_____
Chairman
By_____
Secretary

(SEAL)
Attest

_____

COLUMBIA STORAGE
POWER EXCHANGE
By_____

The American Ambassador to the Canadian Secretary of State for External Affairs

EMBASSY OF THE
UNITED STATES OF AMERICA
Ottawa, September 16, 1964

No. 75

SIR,

I have the honor to refer to your note No. 140 of September 16, 1964, regarding the disposal of the Canadian entitlement to downstream power benefits in the United States, in accordance with Article VIII(1) of the Treaty between the United States of America and Canada relating to the cooperative development of the water resources of the Columbia River Basin, signed at Washington, January 17, 1961.

I wish to advise you that the Government of the United States of America has designated the Administrator of the Bonneville Power Administration, Department of the Interior, and the Division Engineer, North Pacific Division, Corps of Engineers, Department of the Army, as the United States Entity for the purposes of Article XIV(1) of the Treaty. A copy of the designation is attached to this note.

I wish also to advise that the Government of the United States of America confirms the proposals and understandings set forth in your note, and agrees that your note, together with this reply, shall constitute an agreement between our two Governments relating to the implementation of the provisions of the Treaty with effect from the date of the exchange of instruments of ratification of the Treaty.

Accept, Sir, the renewed assurances of my highest consideration.

W.W. BUTTERWORTH

Enclosure:
As stated.

The Honorable
PAUL MARTIN, P.C., Q.C.,
Secretary of State for External Affairs,
Ottawa.

EXECUTIVE ORDER No. 11177.

PROVIDING FOR CERTAIN ARRANGEMENTS UNDER THE COLUMBIA RIVER TREATY

WHEREAS the treaty between the United States and Canada relating to cooperative development of the water resources of the Columbia River Basin (signed at Washington, D.C., on January 17, 1961; Executive C, 87th Congress, 1st Session) has come into force; and

WHEREAS Article XIV of such treaty (hereinafter referred to as the Treaty) provides for the designation of certain entities which are empowered and charged with the duty to formulate and carry out the operating arrangements necessary to implement the Treaty, and authorizes the United States of America to designate one or more of such entities; and

WHEREAS Article XV of the Treaty authorizes the United States of America to appoint two members of the Permanent Engineering Board established by that Article:

NOW, THEREFORE, by virtue of the authority vested in me by the Treaty and by the Constitution and statutes, and as President of the United States, it is hereby ordered as follows:

PART I. UNITED STATES ENTITY

SECTION 101. Designation of Entity. The Administrator of the Bonneville Power Administration, Department of the Interior, and the Division Engineer, North Pacific Division, Corps of Engineers, Department of the Army, are hereby designated as an entity under Article XIV of the Treaty, to be known as the United States Entity for the Columbia River Treaty (hereinafter referred to as the Entity). The designated Administrator shall be the Chairman of the Entity.

SECTION 102. Functions of the Entity. The Entity shall have the functions set forth therefor in Article XIV, and in other provisions, of the Treaty.

SECTION 103. Departmental responsibilities. This order shall not affect (1) the respective responsibilities of the

Department of the Army and the Department of the Interior for project operation and administration, (2) the respective responsibilities of the Secretary of the Army and the Chief of Engineers for the supervision and direction of the Department of the Army and the Office of the Chief of Engineers, or (3) the responsibility of the Secretary of the Interior for the supervision and direction of the Department of the Interior.

PART II. UNITED STATES SECTION, PERMANENT ENGINEERING BOARD

SECTION 201. Appointment of members of the Permanent Engineering Board. (a) The Secretary of the Interior and the Secretary of the Army shall each appoint one person as a United States member of the Permanent Engineering Board established by Article XV of the Treaty.

(b) Each such person shall be selected from among appropriately qualified individuals, who at the time of appointment may be, but need not necessarily be, officers or employees of the United States, and shall serve as a member of the Board during the pleasure of the appointing Secretary.

SECTION 202. Alternate members. In addition to the two members to be appointed under the provisions of Section 201 of this order, there shall be two alternate United States members of the Permanent Engineering Board. The provisions of Section 201 of this order shall apply to the selection, appointment, and service of the alternate members.

SECTION 203. United States Section. The members and alternate members appointed under the foregoing provisions of this Part shall compose the United States Section, Permanent Engineering Board, Columbia River Treaty, hereinafter referred to as the United States Section. The member appointed by the Secretary of the Army under Section 201(a) of this order shall be the Chairman of the United States Section.

SECTION 204. Assistance to the United States Section. With the consent of the respective heads thereof, departments and agencies of the Federal Government may, upon the request of the United States Section and to the extent not inconsistent with law, furnish assistance needed by the Section in connection with the performance of its functions.

PART III. GENERAL

SECTION 301. Reservation. There is hereby reserved the right to modify or terminate any or all of the provisions of this order.

LYNDON B. JOHNSON

THE WHITE HOUSE

September 16, 1964

The Canadian Secretary of State for External Affairs to the American Ambassador

DEPARTMENT OF EXTERNAL AFFAIRS
CANADA

No. 141 OTTAWA, *September 16, 1964*

EXCELLENCY,

I have the honour to refer to my Note of January 22, 1964 addressed to the Honourable Dean Rusk, Secretary of State of the United States of America and the Protocol attached thereto regarding a Treaty between Canada and the United States of America relating to cooperative development of the water resources of the Columbia River Basin signed at Washington on 17 January, 1961 and to Mr. Secretary Rusk's reply of the same date. This Exchange of Notes relating to the carrying out of the provisions of the Treaty provides expressly that it shall come into effect from the date of the exchange of instruments of ratification of the Treaty.

The instruments of ratification of the Treaty having been exchanged on this 16th day of September 1964, I should like to propose that our two Governments confirm that the Intergovernmental Agreement set out in the said Exchange of Notes has now come into full force and effect. I should like to propose further that this Note together with your reply shall constitute an agreement between our two Governments with effect from this 16th day of September 1964.

Accept, Excellency, the renewed assurances of my highest consideration.

PAUL MARTIN
Secretary of State
for External Affairs

His Excellency,
W. WALTON BUTTERWORTH,
Ambassador of the United States
of America,
Ottawa.

The American Ambassador to the Canadian Secretary of State for External Affairs

EMBASSY OF THE
UNITED STATES OF AMERICA
Ottawa, September 16, 1964

No. 76

SIR,

I have the honor to refer to your Note No. 141 dated September 16, 1964 regarding the Treaty between Canada and the United States of America relating to cooperative development of the water resources of the Columbia River Basin signed at Washington on January 17, 1961. I wish to advise you that the Government of the United States of America confirms that the Exchange of Notes with Annex of January 22, 1964 referred to in your note has now come into full force and effect. The Government of the United States of America further agrees that your note together with this reply shall constitute an agreement between our two Governments relating to the carrying out of the provisions of the Treaty with effect from this 16th day of September 1964.

Accept, Sir, the renewed assurances of my highest consideration.

W.W. BUTTERWORTH

The Honorable
PAUL MARTIN, P.C., Q.C.,
Secretary of State for External Affairs,
Ottawa.

TREATY BETWEEN CANADA AND THE UNITED STATES OF AMERICA RELATING TO THE SKAGIT RIVER AND ROSS LAKE, AND THE SEVEN MILE RESERVOIR ON THE PEND D'OREILLE RIVER

Washington, April 2, 1984

TRAITE ENTRE LE CANADA ET LES ETATS-UNIS D'AMERIQUE CONCERNANT LA RIVIERE SKAGIT ET LE LAC ROSS, AINSI QUE LE RESERVOIR SEVEN MILE DE LA RIVIERE PEND D'OREILLE

Washington, le 2 avril 1984

TREATY BETWEEN CANADA AND THE UNITED STATES OF AMERICA RELATING TO THE SKAGIT RIVER AND ROSS LAKE, AND THE SEVEN MILE RESERVOIR ON THE PEND D'OREILLE RIVER

The Government of Canada and the Government of the United States of America,

Bearing in mind the purpose of the Boundary Waters Treaty, in particular with respect to the prevention of disputes between Canada and the United States regarding the use of boundary waters;

Recognizing the desirability of preserving the natural environment of the Skagit Valley, in the Province of British Columbia;

Acknowledging the importance to the economic growth and development of the City of Seattle of the electrical power that would have been produced by the raising of the Ross Dam;

Noting with approval the Agreement dated March 30, 1984 between the Province of British Columbia and the City of Seattle developed under the auspices of the International Joint Commission; and

Having encouraged the achievement of such a settlement and being desirous of securing and promoting the cooperative measures undertaken therein,

Have agreed as follows:

ARTICLE I

DEFINITIONS

For purposes of the Treaty:

(a) "Agreement" means the Agreement entered into between British Columbia and Seattle on March 30, 1984, and its several appendices, contained in the Annex to this Treaty;

(b) "Boundary Waters Treaty" means the Treaty between Great Britain and the United States relating to Boundary Waters and Questions Arising between Canada and the United States, dated January 11, 1909;

(c) "British Columbia" means the Province of British Columbia, Canada;

(d) "Seattle" means the City of Seattle, in the State of Washington, United States of America;

(e) "Normal full pool elevation" means the water level at the dam determined by means of measuring elevation above mean sea level, excluding variations due to wind and wave action on surface water and variations resulting from extraordinary flood conditions, and which in the case of Ross Lake is based on the City of Seattle Ross Dam datum for Ross Lake and in the case of the Seven Mile Reservoir is based on the Geodetic Survey of Canada datum for the Seven Mile Reservoir; and

(f) "Arbitration tribunal" means an arbitration tribunal established pursuant to section 10 and Appendix C of the Agreement.

ARTICLE II

AUTHORIZATIONS

1. (a) In the event that British Columbia discontinues its obligation to deliver electrical power to Seattle under the Agreement or an arbitration tribunal determines that conduct of British Columbia constitutes a material breach of the Agreement, Seattle is, in accordance with and subject to the terms and conditions specified in this Treaty and the Agreement, authorized to raise the level of Ross Lake on the Skagit River by means of construction and operation of Ross Dam to a normal full pool elevation of 1725.0 feet, subject to the terms and conditions contained in Opinion No. 808 of the United States Federal Power Commission issued July 5, 1977, Opinion No. 808A of the Federal Energy Regulatory Commission issued August 2, 1978, and in other actions of the Federal Energy Regulatory Commission in implementation thereof, including provisions for High Ross Dam in the relicensing by the Federal Energy Regulatory Commission of Seattle's Project No. 553, of which Ross Dam is a part.

(b) This authority is to be exercised by Seattle at its option, without regard to any United States law, decision, regulation or order which might be argued as limiting or negating this authority, including provisions of the Federal Power Act relating to the time in which project construction must otherwise commence or to the term of license, or any other provision, during the term of this Treaty, provided that full compensation to British Columbia in the event of operation of Ross Lake at a normal full pool elevation of 1725.0 feet shall be as provided for in the Agreement and in lieu of any conditions in Opinions 808 and 808A or in any licensing order or orders for Project No. 553 with respect to British Columbia, and provided further that unless and until the normal full pool elevation of Ross lake is thus raised, Seattle shall not be required to pay any increase in annual charges attendant thereupon under section 10(e) of the Federal Power Act.

2. The Government of Canada shall obtain the legislative or other authority necessary to enable British Columbia to export electrical power in accordance with the terms and conditions of the Agreement.

ARTICLE III

WATER LEVELS AT THE BOUNDARY

1. During the term of this Treaty, Seattle shall be permitted to operate Ross Lake so as to maintain the level of the Skagit River at the Canada-United States boundary at an elevation consistent with a normal full pool elevation of 1602.5 feet.

2. During the term of this Treaty, British Columbia shall be permitted to operate Seven Mile Reservoir so as to raise the level of the Pend d'Oreille River at the Canada-United States boundary to an elevation consistent with a normal full pool elevation of 1730.0 feet, subject to the delivery by British Columbia to Seattle of energy and capacity lost at Boundary Dam due to tailwater encroachment by the Seven Mile Reservoir.

3. In the event that Seattle discontinues its obligation under the Agreement to make payments to British Columbia for the delivery of electrical power or an arbitration tribunal determines that conduct of Seattle constitutes a material breach of the Agreement, Seattle shall not be permitted to operate Ross Lake so as to raise the level of the Skagit River at the Canada-United States boundary above a level consistent with a normal full pool elevation of 1602.5 feet.

4. In the event that British Columbia discontinues its obligation under the Agreement to deliver electrical power to Seattle or an arbitration tribunal determines that conduct of British Columbia constitutes a material breach of the Agreement, Seattle shall be permitted to operate Ross Lake so as to raise the level of the Skagit River at the Canada-United States boundary to an elevation consistent with a normal full pool elevation of 1725.0 feet.

5. In the event that either Seattle or British Columbia discontinues its respective obligations in accordance with paragraph 3 or paragraph 4 of this Article, or an arbitration tribunal determines that conduct of either constitutes a material breach of the Agreement, British Columbia nonetheless shall be permitted to operate Seven Mile Reservoir so as to maintain the level of the Pend d'Oreille River at the Canada-United States boundary at an elevation consistent with a normal full pool elevation of 1730.0 feet.

6. Notwithstanding paragraph 5 of this Article, in the event that British Columbia discontinues its obligation under the Agreement to deliver electrical power to Seattle or an arbitration tribunal determines that conduct of British Columbia constitutes a material breach of the Agreement, and the obligation of British Columbia to make payment under subparagraph 9(C)(iv) of the Agreement is not met, British Columbia shall not be permitted to operate Seven Mile Reservoir so as to maintain the level of the Pend d'Oreille River at the Canada-United States bound-

ary above a level consistent with a normal full pool elevation of 1715.0 feet.

ARTICLE IV

OBLIGATIONS ON DISCONTINUANCE

1. Canada and the United States shall ensure, in the manner set out in this Article, that financial obligations on the part of British Columbia and Seattle in the event of discontinuance of certain of their respective obligations under the Agreement, are met.

2. (a) In the event that British Columbia discontinues its obligation under the Agreement to deliver electrical power to Seattle or an arbitration tribunal determines that British Columbia is in material breach of the Agreement, Canada shall endeavor to ensure that British Columbia pays to Seattle any amount owing under subparagraph 9(C)(iv) of the Agreement. In the event that an arbitration tribunal determines the amount owed by British Columbia to Seattle under that subparagraph and that British Columbia has failed to discharge its obligation to pay that amount to Seattle, Canada shall pay such amount to the United States in United States currency.

(b) Payment of such amount by Canada shall be in full satisfaction of British Columbia's obligations under subparagraph 9(C)(iv) of the Agreement.

3. (a) In the event that Seattle discontinues its obligation under the Agreement to make payments to British Columbia, or an arbitration tribunal determines that Seattle is in material breach of the Agreement, the United States shall endeavor to ensure that Seattle pays to British Columbia any amount owing under Section 5 of the Agreement. In the event that an arbitration tribunal determines the amount owed by Seattle to British Columbia under that section and that Seattle has failed to discharge its obligation to pay that amount to British Columbia, the United States shall pay such amount to Canada in United States currency.

(b) Payment of such amount by the United States shall be in full satisfaction of Seattle's obligations under Section 5 of the Agreement.

ARTICLE V

TRANSMISSION OF POWER

The rate imposed by the Bonneville Power Administration, or its successor agency, for the transmission of power from British Columbia to Seattle pursuant to the Agreement shall be no greater than if the power were generated, and transmitted on the Federal Columbia River Power System, wholly within the State of Washington.

ARTICLE VI

EFFECT ON BOUNDARY WATERS TREATY

1. Nothing in this Treaty shall affect the application of the Boundary Waters Treaty except as provided in paragraph 2 of this Article.

2. During the period in which this Treaty is in force, the powers, functions and responsibilities of the International Joint Commission under Article IV, paragraph 1 and Article VIII of the Boundary Waters Treaty shall not apply to the Skagit River and Ross Lake or to the Pend d'Oreille River and the Seven Mile Reservoir.

ARTICLE VII

AMENDMENT OF THE AGREEMENT

Amendments to the Agreement proposed by British Columbia and Seattle shall be submitted to the Parties for timely review. Amendments that, in the view of either Party, would affect the rights and obligations of the Parties under the Treaty shall enter into force only upon an exchange of notes between the Parties. All other amendments shall enter into force as agreed upon between British Columbia and Seattle.

ARTICLE VIII

ENTRY INTO FORCE AND DURATION

This Treaty shall enter into force on the date the Parties exchange instruments of ratification, and shall remain in

force until terminated by agreement of the Parties, or by either Party upon not less than twelve months written notice which may be given no earlier than January 1, 2065.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Treaty.

DONE at Washington in duplicate, in the English and French languages, both texts being equally authentic, this second day of April, 1984.

FOR THE GOVERNMENT OF CANADA:

/s/ ALLAN J. MACEACHEN

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

/s/ GEORGE P. SCHULTZ

MEMORANDUM

December 18, 1984

To: Randy Hardy, Mac Macdonald, John Saven, Kathy Fletcher, Jerry Gorman, May Gerstle, C. T. Rochey, Del Mercure

From: Arthur T. Lane

Subject: Ratification for the Skagit River Treaty

This will advise you that on Friday, December 14, 1984 instruments of ratification for the Skagit River Treaty were exchanged in Ottawa between John Fraser, Minister of Fisheries for Canada, and Ambassador Robinson for the U.S.A. This means that the Treaty and all associated contracts, including the B.C.-Seattle agreement, and the indemnification agreements between the Province and Canada and between Seattle and the federal government, are now in full force and effect.

NORTH AMERICAN FREE TRADE AGREEMENT
BETWEEN
THE GOVERNMENT OF THE UNITED STATES OF AMERICA,
THE GOVERNMENT OF CANADA
AND
THE GOVERNMENT OF THE UNITED MEXICAN STATES

[Done at Washington on December 8 and 17, 1992,
at Ottawa on December 11 and 17, 1992
and at Mexico City on December 14 and 17, 1992]

* * * * *

PART FIVE
INVESTMENT, SERVICES, AND RELATED MATTERS
Chapter Eleven
Investment
Section A - Investment

* * * * *

Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, of the Party of which it forms a part.

4. For greater certainty, no Party may:

   (a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or

   (b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.

Article 1103: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

* * * * *

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1441 provides:

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if –

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determi-

nation of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1442 provides:

§ 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603, provides:

§ 1603. Definitions

For purposes of this chapter –

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605, provides:

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a

foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if

such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph –

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if –

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That –

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or

cargo [illegible]rrested pursuant to process obtained on behalf of the [illegible]ty bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in

the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a) –

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) Limitation on Discovery. –

(1) In general. – (A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the

Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset. – (A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would –

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence. – The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss. – A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction. – Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

No. 5

CONSTITUTION ACT, 1867

(*THE BRITISH NORTH AMERICA ACT, 1867*)

[Note: The present short title was substituted for the original short title (in italics) by the *Constitution Act, 1982* (No. 44 *infra*).]

30 & 31 Victoria, c. 3 (U.K.)

An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith

[29th March 1867]

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America:

Be it therefore enacted and declared by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

[Note: The enacting clause was repealed by the *Statute Law Revision Act, 1893* (No. 17 *infra*).]

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VIII. REVENUES; DEBTS; ASSETS; TAXATION

* * * * *

Exemption of public lands, etc.

125. No lands or property belonging to Canada or any Province shall be liable to Taxation.

* * * * *

HYDRO AND POWER AUTHORITY ACT
[R.S.B.C. 1996] CHAPTER 212

Contents

Section

1 Definitions
2 Authority continued
3 Agent of government
4 Directors
5 Powers of directors
6 Directors' proceedings
7 Interests of directors
8 Resolutions
9 Executive committee
10 Appointment of employees
11 Bonds
12 Powers
13 Compliance with requirement
14 Tenders
15 Opening tenders
16 Expropriation
17 Compulsory supply of power
18 Release on expropriation
19 Application of expropriation power
20 Power of entry, etc.
21 Borrowing by authority
22 Authorization to borrow from Canada Pension Plan
23 Guarantee of principal and interest
24 Guarantees respecting leases
25 Borrowing limitation
26 United States dollars
27 All funds paid into one fund

28 Examination and report by Comptroller General
29 Annual report
30 Liability of authority
31 Nuisance actions
32 Application of other statutes
33 Certificate deemed to be granted
34 Taxation
35 Directives
36 Pension arrangements
37 Pension: further provision
37.1 Joint management agreement
38 Power to make regulations

Definitions

1 In this Act:

"authority" means the British Columbia Hydro and Power Authority continued under this Act;

"commission" means the British Columbia Utilities Commission continued under the *Utilities Commission Act*;

"generation" means production by hydraulic, electrical, steam, internal combustion engine, gas, oil or by any other process;

"judge" means a justice of the Court of Appeal or a judge of the Supreme Court;

"owner"

(a) in relation to land, means a person registered in the books of a land title office as owner of land or of a charge on land, whether entitled to it in the person's own right or in a representative capacity or otherwise and includes a lessee in possession for a term of 3 years or

less and a person who is the owner, although unregistered, of an estate less than the fee simple granted by the Crown, and

(b) in relation to other property, includes a mortgagee, person entitled to a limited estate or interest and a guardian, executor, administrator or trustee in whom any property or interest in any property is vested;

"power" includes energy, light and heat however developed or produced, and includes electricity and natural, manufactured or mixed gas, or liquefied petroleum gas;

"power plant" or **"plant"** includes all land, water, rights to the use of water, buildings, works, machinery, installations, materials, devices, fittings, apparatus, appliances, offices, furniture and equipment, vehicles, tools, stores and supplies, including office stores and supplies, constructed, acquired or used or adapted, or that, in the opinion of the authority, might be used or adapted for or in connection with the generation or supply of power;

"power project" includes any charter, franchise, privilege or other right, or land, buildings, plant, machinery or equipment acquired, or proposed to be acquired, by a person with a view to the generation or supply of power, or any plans, surveys or data made or assembled with a view to the generation or supply of power;

"power site" includes any land, or any lake, river, stream, watercourse or body of water, water licence or privilege, or reservoir, dam, water storage, sluice, canal, raceway, tunnel or aqueduct that is used or that, in the

opinion of the authority, might be used for or in connection with the generation or supply of power;

"supply" as a noun means reservation, transmission, distribution, capacity to provide, dealing in and sale; and as a verb has a corresponding meaning.

Authority continued

2 The corporation known as the British Columbia Hydro and Power Authority is continued, consisting of persons who are appointed as directors and who hold office as provided in this Act.

Agent of government

3 (1) The authority is for all its purposes an agent of the government and its powers may be exercised only as an agent of the government.

(2) The Minister of Finance and Corporate Relations is the fiscal agent of the authority.

(3) The authority, on behalf of the government, may contract in its corporate name without specific reference to the government.

Directors

4 (1) The Lieutenant Governor in Council appoints the directors of the authority who hold office during pleasure.

(2) The Lieutenant Governor in Council must appoint one or more of the directors to chair the authority.

(3) A chair or other director must be paid by the authority the salary, directors' fee and other remuneration the Lieutenant Governor in Council determines.

Powers of directors

5 The directors must manage the affairs of the authority or supervise the management of those affairs, and may

(a) exercise the powers conferred on them under this Act,

(b) exercise the powers of the authority on behalf of the authority, and

(c) delegate the exercise or performance of a power or duty conferred or imposed on them to anyone employed by the authority.

* * * * *

Executive committee

9 (1) The Lieutenant Governor in Council may appoint an executive management committee of the authority that is composed of not more than 5 directors, and that must, subject to the direction of the directors of the authority, manage the operations of the authority.

(2) The members of the executive management committee may be paid remuneration determined by the Lieutenant Governor in Council.

Appointment of employees

10 The authority may, without regard to the *Public Service Act*, appoint a secretary and executive officers, engineers, solicitors, accountants, employees, consultants and agents it thinks necessary for its business, and may define their duties, determine their compensation and provide a system of organization to establish responsibility and promote efficiency.

* * * * *

Powers

12 (1) Subject to the approval of the Lieutenant Governor in Council, which may be given by order of the Lieutenant Governor in Council, the authority has the power to do the following:

(a) generate, manufacture, distribute and supply power;

(b) develop power sites, power projects and power plants;

(c) act as a carrier of passengers and freight;

(d) flood and overflow land, purchase, otherwise acquire, accumulate and store water, raise or lower the level of rivers, lakes, streams and other bodies of water, and purchase and otherwise acquire water records and water privileges;

(e) manufacture and deal in all articles and things required for exercising the powers and duties of the authority;

(f) acquire, maintain, develop, replace, alter, administer, manage, operate and dispose of property;

(g) build, make, construct and establish every kind of structure, excavation or installation and install every kind of equipment or facility;

(h) acquire and protect, prolong and renew patents, patent rights, trade marks, designs, licences, franchises, concessions, and use, exercise, develop, manufacture under or grant licences or privileges in respect of those acquisitions and experiment with, test and improve patents, rights, inventions, discoveries, processes or information;

(i) require a person who owns, operates or controls a power site, power project or power plant to furnish to the authority, within the time specified in the demand, the particulars specified in the demand of the power site, power project or power plant;

(j) apply for and obtain and exercise any franchise, licence, right or privilege that may be conferred or obtained under any Act of Canada or of any province;

(k) acquire in accordance with a statute relating thereto the right to enter on roads, highways, railways, rivers, streams, waterways and other public places to erect on, over or under any of them anything for the generation or supply of power;

(*l*) integrate existing power plants;

(m) purchase power from or sell power to a firm or person;

(n) purchase, subscribe for, underwrite, guarantee the subscription of and otherwise acquire and deal in, sell and dispose of stock, shares, bonds, debentures, debenture stock, notes, securities and evidences of indebtedness, of any corporation and any stocks, funds and securities of any government, municipality or other authority;

(o) acquire or lease all or part of the property, assets and undertaking, and assume any of the obligations and liabilities of a firm or person carrying on or entitled to carry on any activities that the authority is authorized to carry on or that can be carried on incidental to or in connection with the exercise of the powers and duties of the authority;

(p) assume duties and obligations of a firm or person, reimburse others for payments made and liabilities incurred and indemnify others against liabilities;

(q) issue securities in exchange for obligations assumed by the authority or in exchange for securities of any other firm or person representing those obligations, and enter into any covenants or agreements considered necessary or desirable for that purpose;

(r) amalgamate in any manner with or enter into partnership with a firm or person;

(s) enter into a working arrangement with or cooperate with a firm or person carrying on or proposing to carry on an activity that the authority is empowered to carry on;

(t) by agreement or otherwise, take part in or take over all or part of the management, supervision or control of the business or operations of a firm or person;

(u) enter into agreements with a firm or person for any of the purposes of this Act;

(v) finance the operations of a corporation that has powers the exercise of which, in the opinion of the directors, would be beneficial to the authority;

(w) do immediately anything referred to in this section in contemplation of future requirements;

(x) do anything necessary or desirable for carrying out any of the powers and purposes in this section;

(y) exercise any of the powers in section 22 of the *Companies Act*, R.S.B.C. 1960, c. 67.

(2) If the authority

(a) acquires all of the property, assets or undertaking of a firm or person,

(b) assumes the obligations and liabilities of a firm or person,

(c) amalgamates in any manner with or enters into partnership with a firm or person, or

(d) takes over the management, supervision or control of the business of a firm or person,

the authority or the amalgamated corporation, if there is an amalgamation, may exercise and perform any power or duty conferred or imposed

on it or on that other firm or person under this or any other Act for and on behalf of that other firm or person, or the amalgamated corporation, or with respect to the property or undertaking of that other firm or person, or the amalgamated corporation, with or without exercising or performing any other resulting power or duty.

(3) If the authority amalgamates with or enters into partnership with a firm or person, this Act applies as if the amalgamated corporation or the partnership were the authority.

(4) The Lieutenant Governor in Council may, by order, prescribe the procedure to be followed in amalgamation of the authority with a firm or person.

(5) If the authority acquires all of the property, assets or undertaking of or amalgamates in any manner with or enters into partnership with a firm or person, then despite the *Land Title Act*, all of the interests of that firm or person registered in a land title office are deemed to be registered interests of the authority, or the amalgamated corporation, or the partnership, as the case may be, and the registrar must accordingly make all necessary amendments to the register, and the amendments constitute registration under the *Land Title Act* in favour of the authority, the amalgamated corporation or the partnership, as the case may be.

(6) The Lieutenant Governor in Council may make regulations necessary for carrying out subsection (5).

(7) Fees must not be paid for anything done under subsection (5) or (6).

(8) Nothing in this section relieves the authority from any requirement of the *Utilities Commis-*

sion Act that applies to the authority under section 32 (7).

(9) The Lieutenant Governor in Council, by order, may designate any agreement entered into or to be entered into by the authority that the Lieutenant Governor in Council considers relates to the provision of support services to or on behalf of the authority.

(10) For the purposes of subsection (9), "support services" means services that support or are ancillary to the activities of the authority from time to time, and includes services related to metering for, billing and collecting fees, charges, tariffs, rates and other compensation for electricity sold, delivered or provided by the authority, but does not include the production, generation, storage, transmission, sale, delivery or provision of electricity.

(11) Despite the common law and the provisions of this or any other enactment, if an agreement is designated under subsection (9),

(a) the authority is deemed to have, and to have always had, the power and capacity to enter into the agreement,

(b) the agreement and all actions of the authority taken in accordance with the provisions of the agreement are authorized, valid and deemed to be required for the public convenience and necessity,

(c) the authority is deemed to have, and to have always had, the power and capacity to carry out all of the obligations imposed under, and to exercise all of the rights, powers and privileges granted by, the agreement according to its terms,

(d) the agreement is binding on and enforceable by the authority, according to the agreement's terms, and

(e) subject to subsection (12), the authority is not required to obtain any approval, authorization, permit or order under the *Utilities Commission Act* in connection with the agreement or any actions taken in accordance with the terms of the agreement, and the commission must not prohibit the authority from taking any action that the authority is entitled or required to take under the terms of the agreement.

(12) Nothing in subsection (11)(e) precludes the commission from considering the costs incurred, or to be incurred, in relation to an agreement designated under subsection (9) when establishing the revenue requirements and setting the rates of the authority.

(13) Subsections (3) and (5) do not apply to any partnership created by, under or in furtherance of an agreement designated under subsection (9).

* * * * *

Expropriation

16 (1) The authority may, for any purpose related to the exercise of its powers,

(a) expropriate any property, power site, power project or power plant,

(b) enter, remain on, take possession of and use any property,

(c) on land that it expropriates,

(i) erect, make or place on the land any structure, installation, excavation or power plant, and

(ii) flood and overflow the land and accumulate and store water on it, and

(d) require and compel a person who generates or supplies power to enter into an agreement to supply to the authority as much of that power as the authority requires.

(2) If land is expropriated under subsection (1), the *Expropriation Act* applies.

(3) If the authority exercises a power under subsection (1) that does not constitute the expropriation of land requiring approval under the *Expropriation Act*, it must obtain the approval of the minister before the power is exercised.

(4) If the authority expropriates property under subsection (1) other than land, the authority must notify the Attorney General and, if required by the Attorney General, file a notice describing the property at a place designated by the Attorney General.

(5) Despite any other Act, the property referred to in subsection (3) that is expropriated vests in the authority free and clear of all encumbrances

(a) when the notice is filed under subsection (4), or

(b) if no filing is requested, when the Attorney General receives the notification under subsection (4).

(6) After property vests under subsection (5), the authority must serve on the owner of the property a notice containing a description of the property sufficient to identify it, together with a declaration of readiness to pay compensation in an amount to be agreed on or to be determined under subsection (9).

(7) If an owner is absent from British Columbia or is unknown or cannot be served, the Supreme Court may, on the application of the authority,

order that the notice under subsection (6) be published in a manner and for a time that the court thinks proper, and, on publication, the owner is deemed to have been served with the notice.

(8) If the authority exercises its powers under subsection (1), other than in relation to the expropriation of land, it must pay compensation for

(a) the interest, property, matter or thing expropriated, entered on or used, and

(b) damages to any property that directly result from the expropriation, entry or use.

(9) If the authority and a person entitled to compensation fail to agree on the amount of compensation payable under subsection (8), the amount must be determined by the Expropriation Compensation Board established under the *Expropriation Act*.

Compulsory supply of power

17 (1) If the authority is unable to agree with a person required or compelled to supply power under section 16 (1) (d) on the amount of power available for the authority's use or the price to be paid for it or on any matter relating to supplying the power desired, the commission must, on application of either party, after a hearing, determine the amount of power, if any, to be supplied and the price to be paid for it, and also any other matter on which agreement has not been reached.

(2) A determination of the commission under subsection (1) is final.

* * * * *

Borrowing by authority

21 (1) Subject to the approval of the Lieutenant Governor in Council and within the borrowing limi-

tation set out in section 25, the authority, for any of the purposes of the authority, may

(a) borrow sums of money the authority thinks are required, and

(b) issue notes, bonds, debentures and other securities bearing interest at rates and payable as to principal and interest in currencies and at places and at times and in a manner the authority determines.

(2) The directors of the authority may, by resolution, delegate any of their powers or the powers of the authority under this section to any director or officer of the authority.

(3) A resolution under this section approved by the required number of directors by telex, telegraph, telephone or any other similar means of communication confirmed in writing or other graphic communication, is as valid and effectual as if it had been passed at a meeting of the directors properly called and constituted.

(4) The notes, bonds, debentures and other securities of the authority may be made redeemable in advance of maturity at times and at prices the directors of the authority determine at the time of the issue.

(5) For this section, the purposes of the authority, without limiting any other provision of this Act, include the following:

(a) payment, refunding, exchange or renewal of all or any part of a loan raised or securities issued by the authority, except to the extent that a sinking fund is available for the payment of the loan or securities, and a recital or declaration in the resolution or minutes of the authority authorizing the issue of securities as to the amount of any

sinking fund so available is conclusive evidence of the fact;

(b) payment of all or any part of a loan, liability or bonds, debentures or other securities, payment of which is guaranteed or assumed by the authority;

(c) payment of any other liability or indebtedness of the authority;

(d) carrying out any of the powers referred to in this Act, providing in whole or in part for expenditures of the authority made or to be made in connection with them, reimbursing the authority for any of those expenditures and repaying all or part of any temporary borrowings of the authority for any of those purposes;

(e) the exercise of a power, right, function or duty conferred or imposed on the authority by or under this or any other Act or law.

(6) The authority may borrow and may issue under subsection (1) in amounts that will realize the net sum required by the authority for its purposes, and a recital or declaration in the resolution or minutes of the authority authorizing the issue of securities to the effect that the issue of the authorized securities is being made for the purposes of the authority and that the amount is necessary to realize the net sum required for the purposes of the authority is conclusive evidence of the fact.

(7) Subject to the approval of the Lieutenant Governor in Council, on terms and conditions thought advisable, the authority may dispose of the notes, bonds, debentures and other securities of the authority, either at the par value of them or at less or more than the par value, and may charge, pledge, hypothecate, deposit or oth-

erwise deal with the securities as collateral security.

(8) Subject to the approval of the Lieutenant Governor in Council on terms and conditions thought advisable, the authority may exchange notes, bonds, debentures or other securities of the authority for securities of another corporation

(a) in an amount or amounts equal to or greater or smaller than the amount or amounts of the notes, bonds, debentures or other securities of the authority,

(b) bearing interest payable at the same or different time or times as the interest payable under the notes, bonds, debentures or other securities of the authority,

(c) bearing interest at the same or a greater or smaller rate as or than the interest payable under the notes, bonds, debentures or other securities of the authority,

(d) due on the same or on an earlier or later date as or than the notes, bonds, debentures or other securities of the authority, and

(e) callable whether or not the notes, bonds, debentures or other securities of the authority are callable and on the same or different terms and conditions as or than the notes, bonds, debentures or other securities of the authority if they are callable.

* * * * *

(10) The notes, bonds, debentures and other securities of the authority must be in a form determined by the directors of the authority or on behalf of the authority by the Minister of Finance and Corporate Relations as fiscal agent for the authority.

* * * * *

(14) Subject to the approval of the Lieutenant Governor in Council and within the borrowing limitation set out in section 25, the authority may also borrow by way of temporary loans from any person the sums on the terms, for the purposes and on the conditions the directors of the authority determine, by way of bank overdraft or line of credit, or by the pledging as security for the temporary loans of notes, bonds, debentures or other securities of the authority pending the sale of them or in place of selling them, or in whatever other manner the directors of the authority determine.

* * * * *

(16) The Minister of Finance and Corporate Relations, as fiscal agent of the authority, may arrange all details and do, transact and execute all deeds, matters and things that are required during the negotiation of a loan or for placing a loan.

(17) Money raised by the authority under this section must be paid by the authority into the fund established under section 27.

(18) The authority, except in the case of temporary loans of a term not exceeding 5 years and of issues of securities repayable in installments of principal, must set aside a sum that, together with interest compounded annually on it at a rate determined by the Lieutenant Governor in Council, would be sufficient, irrespective of the date or dates of maturity of the securities being issued, to provide a sinking fund for the repayment in full of any securities issued by the authority

(a) within a period not exceeding 50 years from the date of them, or

(b) in the case of securities issued by the authority under subsection (5)(a) other than for repaying or renewing a temporary loan in whole or in part, within a period not exceeding 50 years from the date of original issue of the securities being repaid, refunded or renewed.

* * * * *

(20) The sum referred to in subsection (18) must be paid to the Minister of Finance and Corporate Relations, who must

(a) act as trustee for the authority,

(b) establish one or more appropriate sinking fund trustee accounts, and

(c) subject to subsection (21), invest that sum and the interest earned on it in investments permitted for a trust fund under section 40 (4) of the *Financial Administration Act*.

* * * * *

Authorization to borrow from Canada Pension Plan

22 Despite anything in this Act, the authority may, in the bylaw or resolution under section 21, authorize the Minister of Finance and Corporate Relations or, with the concurrence of the Minister of Finance and Corporate Relations, authorize the Minister of Finance of Canada to determine any matter required to be determined under section 21 for

(a) borrowing money from the Canada Pension Plan Investment Fund established under the Canada Pension Plan, and

(b) issuing and selling to the Receiver General and Minister of Finance of Canada for the credit of the Canada Pension Plan Invest-

ment Fund debentures as security for the loans.

Guarantee of principal and interest

23 (1) The Lieutenant Governor in Council, for and on behalf of the government, may guarantee the payment of the principal and interest of and on any of the following:

(a) notes, bonds, securities, debentures, debenture stock, loans or obligations issued by the authority or the payment of which is assumed by the authority;

(b) notes, bonds, securities, debentures, debenture stock or loans issued by a firm or person if

(i) all of the property, assets or undertaking of the firm or person has been acquired by the authority,

(ii) the obligations and liabilities of the firm or person has been assumed by the authority,

(iii) the firm or person is amalgamated with the authority, or

(iv) the management, supervision or control of the business of the firm or person has been taken over by the authority.

* * * * *

Guarantees respecting leases

24 (1) The government may, on terms approved by the Lieutenant Governor in Council, guarantee payments of the authority under a lease made by or to the authority.

(2) The Lieutenant Governor in Council may authorize

(a) the Minister of Finance and Corporate Relations, or

(b) an officer of the Ministry of Finance and Corporate Relations,

to sign the guarantee on behalf of the government, and the signature of that person on the guarantee is conclusive proof that this section has been complied with.

(3) Money required to be paid by the government in respect of a guarantee given under this section must be paid out of the consolidated revenue fund without an appropriation other than this Act.

* * * * *

Examination and report by Comptroller General

28 (1) The Minister of Finance and Corporate Relations may direct the Comptroller General of British Columbia to examine and report to the Treasury Board on any or all of the financial and accounting operations of the authority.

(2) The accounts of the authority must at least once in every year, be audited and reported on by an auditor or auditors appointed by the Lieutenant Governor in Council, and the costs of the audit must be paid by the authority.

(3) The Lieutenant Governor in Council must appoint the auditors and the bankers of the authority, who hold office during pleasure.

Annual report

29 (1) The authority must make to the Lieutenant Governor in Council an annual report containing clear and comprehensive financial statements made up to March 31 last preceding.

(2) If the Legislature is then in session, the report must be laid before it at once, otherwise within 15 days after the opening of the next session.

(3) The *Financial Information Act* applies to the authority.

Liability of authority

30 (1) The authority may sue and be sued in its own corporate name for any right or obligation acquired or incurred by it on behalf of the government as if the right or obligation had been acquired or incurred on its own behalf and also in respect of any liabilities in tort to which it is made subject by this Act.

(2) The authority is liable in tort for the damages for which if it were a private person of full age and capacity it would be subject

(a) for torts committed by its servants or agents, and

(b) for a breach of duty that attaches to the ownership, occupation, possession or control of property.

(3) An action or other proceeding does not lie against the authority or against a servant or agent of the authority or against the government for

(a) any claim against the authority or a servant or agent of the authority if a pension or compensation has been paid or is payable out of the consolidated revenue fund or out of any funds administered by an agent of the government for the death, injury, damage or loss in respect of which the claim is made, or

(b) an act or omission of a servant or agent of the authority unless the act or omission would, apart from this section, have given rise to a cause of action in tort against that servant or agent or his or her personal representative.

(4) In all proceedings to which the authority is a party, the court may pronounce a judgment or

make an order or direction as to costs in favour of or against the authority.

Nuisance actions

31 Despite section 30, the authority is not liable in an action based on nuisance or on the rule in Rylands v. Fletcher, unless the authority was negligent.

Application of other statutes

32 (1) Despite any specific provision in any Act to the contrary, except as otherwise provided by or under this Act, the authority is not bound by any statute or statutory provision of British Columbia.

(2) The authority is an employer under the *Workers Compensation Act*.

(3) Money owing, payable or accruing due from the authority as salary or wages to any of its members or employees may be attached under the *Court Order Enforcement Act* the same as money owing, payable or accruing due from any person to the Crown, and for that purpose that Act applies to the authority.

(4) Money, as defined in section 25 of the *Family Maintenance Enforcement Act*, that is owing, payable or accruing due from the authority to any of its members or employees may be attached or garnished under section 15, 18 or 24 of that Act, and that Act applies to the authority.

(5) Service of all orders, notices and processes required to be served on the authority as garnishee or attachee must be effected by personal service on the secretary of the authority or by leaving the document or documents at the secretary's office.

(6) The Lieutenant Governor in Council may, by regulation, make applicable to the authority any statutory provision.

(7) The following Acts and provisions apply to the authority:

(a) the *Auditor General Act*;

(b) [Repealed 1998-30-93.]

(b.1) the *Budget Transparency and Accountability Act*;

(c) section 128 of the *Company Act*;

(d) [Repealed 2001-30-16.]

(e) the *Debtor Assistance Act*;

(f) [Repealed 2003-46-22.]

(g) the *Employment Standards Act*;

(h) the *Environmental Assessment Act*;

(i) the *Environment Management Act*;

(j) the *Expropriation Act*;

(k) sections 4.1, 52 to 55, 77 and 79 of the *Financial Administration Act*;

(*l*) the *Forest Act*;

(m) the *Geothermal Resources Act*;

(m.1) the *Greater Vancouver Transportation Authority Act*;

(n) the *Heritage Conservation Act*;

(o) the *Human Rights Code*;

(p) the *Insurance (Motor Vehicle) Act*;

(q) the *Labour Relations Code*;

(r) the *Limitation Act*;

(s) the *Ombudsman Act*;

(s.1) the *Pension Benefits Standards Act*;

(t) the *Pesticide Control Act*;

(u) the *Petroleum and Natural Gas Act*;

(v) the *Property Transfer Tax Act*;

(v.1) the *Public Sector Employers Act*;

(w) sections 3 and 5 of the *Railway Act*;

(x) the *Utilities Commission Act*, except sections 50, 51 (c), 52, 57 (2), 95 and 98;

(y) the *Waste Management Act*;

(z) sections 1 to 26, 29, 31 to 42, 44, 45, 46, except subsection (2) (c), and 47 to 49 of the *Water Act*.

(8) The *Transmission Corporation Act* applies to the authority in the manner and to the extent contemplated by that Act.

* * * * *

Taxation

34 (1) With the approval of the Lieutenant Governor in Council, the authority may make annual grants to the Surveyor of Taxes with respect to a rural area and to municipalities and other local governments within the territorial jurisdiction of which the authority generates, transmits or sells electric power or otherwise carries on business.

(2) Except as provided by order of the Lieutenant Governor in Council, land and improvements of the authority as defined by the *School Act* must be included for the calculation of Provincial grants to school districts and the net taxable value of land and improvements of the authority as defined in the *School Act* must be assessed and taxed in each year.

(3) An order of the Lieutenant Governor in Council under subsection (2) may be made for any period, whether before, on or after, or partly before and partly after April 6, 1968.

Directives

35 Despite the *Utilities Commission Act*, the Lieutenant Governor in Council may issue directives directing the authority in a fiscal year to pay to the government an amount specified in the directive and may issue directives directing the authority in a fiscal year to pay to the persons constituting one or more classes of the authority's past or present customers an amount specified in the directive.

Pension arrangements

36 (1) With the approval of the Lieutenant Governor in Council, the authority may

(a) establish and maintain a fund for the payment of superannuation allowances or allowances on the death or disability of directors and employees,

(b) make regulations providing for

(i) contributions to the fund by the authority and directors and employees,

(ii) the terms and conditions on which superannuation allowances or other allowances may be payable, and

(iii) the persons to whom allowances may be paid,

(c) make regulations providing for

(i) the continuation or amendment of existing superannuation or retirement plans or arrangements or for the integration of former plans with any plan established under this section,

(ii) meeting or removing any difficulty arising out of the concurrent administration of the plan established under this section and the plan or plans in effect

at the time that subparagraph (i) becomes effective, and

(iii) preserving and giving effect to the rights of all persons accrued or accruing under former plans,

and the regulations may be applicable generally or to particular cases, and

(d) [Repealed 1999-44-61.]

(e) amend any regulation made under this section.

(2) Despite this or any other Act, the matters respecting the establishment and maintenance of a fund for the payment of superannuation allowances or allowances on the death or disability of directors or employees under subsection (1), including

(a) contributions to the fund by the authority and directors and employees,

(b) the terms and conditions on which superannuation allowances or other allowances may be payable, and

(c) the persons to whom allowances may be paid,

must not be the subject of a collective agreement between the authority and its employees.

(3) Despite subsection (1), the regulations for a superannuation plan may provide for payment to the authority from the amount standing to the credit of a contributor or former contributor sums necessary to make good any default in accounting for any money belonging to the authority that was entrusted to the contributor or any debt that may be due by the contributor to the authority.

(4) If a contributor dies while in the service of the authority, a payment from the fund to a person

nominated by the contributor or to the contributor's spouse is not subject to the control of the creditors of the contributor and does not form part of the contributor's estate.

(5) Despite any requirement or agreements existing and applicable to any superannuation or retirement plan or scheme for the benefit of any officers or employees of the authority or corporation formed by amalgamation under this Act or a partnership formed under this Act, the Lieutenant Governor in Council may rescind the appointment of any trustee under any plan or scheme and appoint a trustee or trustees in place of that trustee.

(6) The trustee appointed by the Lieutenant Governor in Council under subsection (5) need not be a trust company.

* * * * *

Power to make regulations

38 The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.

POWER FOR JOBS DEVELOPMENT ACT
CHAPTER 51

Assented to July 30, 1997

Contents

Section

PART 1 — INTRODUCTORY PROVISIONS

1 Definitions

2 Purpose

PART 2 — PROVISION OF ELECTRICAL POWER

3 Development power rates

4 Considerations of Lieutenant Governor in Council

5 Terms of orders

6 Customers outside the area of the authority

7 Effect of development power rates

8 Application to the administrator

PART 3 — POWER FOR JOBS ADMINISTRATOR

9 Administrator's mandate

10 Considerations administrator is to consider

11 Confidentiality

12 No testimony in civil action

13 Report to Lieutenant Governor in Council

PART 4 — GENERAL PROVISIONS

14 Offence

15 Power to make regulations

16 Commencement

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

PART 1 — INTRODUCTORY PROVISIONS

Definitions

1 In this Act:

"**administrator**" means an officer or employee of the ministry or of a government body, within the meaning of the Financial Administration Act, designated as the Power for Jobs Administrator by the minister;

"**authority**" means the British Columbia Hydro and Power Authority and includes a subsidiary of the British Columbia Hydro and Power Authority;

"**business**" means an individual, partnership, corporation or other organization carrying on, in British Columbia, a trade, enterprise, calling or undertaking or preparing to do so;

"**Canadian entitlement**" means the Canadian share of downstream power benefits as determined under Article VII of the Treaty between Canada and the United States of America relating to Cooperative Development of the Water Resources of the Columbia River Basin;

"**customer**" means a business that, for the operation of a plant or for any other economic activity, purchases electricity in an amount that exceeds 35 kW annually;

"**development power rate**" means

(a) a rate that is payable to the authority or the government by a business in respect of which an order is made under section 3 for one or both of surplus electricity and the delivery of that surplus electricity, or

(b) a rate that is payable to a public utility or to a municipality or regional district by a business in respect of which an order is made under section 6 for one or both of

surplus electricity and the delivery of that surplus electricity;

"**Job Protection Commissioner**" means the Job Protection Commissioner appointed under the *Job Protection Act*;

"**public utility**" has the same meaning as in the *Utilities Commission Act*;

"**rate**" includes

(a) a general, individual or joint rate, fare, toll, charge, rental or other compensation of a public utility or of the government,

(b) a rule, practice, measurement, classification or contract of a public utility, the government or a corporation relating to a rate, and

(c) a schedule or tariff respecting a rate;

"**supply**" includes wheeling by the authority of surplus electricity that is a portion of the Canadian entitlement;

"**surplus electricity**" means electricity that is one or both of the following:

(a) surplus to the authority's requirements to supply

(i) customers in the authority's service area, and

(ii) electricity in respect of which removal is permitted under the *Utilities Commission Act* and that is either

(A) produced at a hydroelectric generating facility owned by the authority, or

(B) purchased by the authority from another source;

(b) a portion of the Canadian entitlement that the Lieutenant Governor in Council de

termines may be made available from time to time for the purpose of this Act.

Purpose

2 The purpose of this Act is to help ensure that British Columbia's electric power resources contribute to the creation and retention of jobs in British Columbia and to regional economic development.

PART 2 — PROVISION OF ELECTRICAL POWER

Development power rates

3 On application by any business and despite the rate charged by the authority for the supply of electricity to the business, the Lieutenant Governor in Council may order that surplus electricity be supplied to, and a development power rate applies to some or all of the supply of electricity to, that business if the application is consistent with the criteria prescribed under section 15(2)(a) and if

(a) the business proposes to construct or expand a plant or to expand operations in the authority's service area, the proposed plant or expansion will have the effect of expanding employment and the business would, after completion of the plant or expansion, fall within the definition of "customer", or

(b) the business is a customer that requires financial assistance to maintain

(i) the ongoing viability of the business's plant or operations, and

(ii) the continued employment of persons.

Considerations of Lieutenant Governor in Council

4 Before making an order under section 3 or 6 in respect of a business, the Lieutenant Governor in Council may consider any recommendations made

by the administrator in relation to the business' application.

Terms of orders

5 An order in relation to a business under section 3 or 6 may contain terms that the Lieutenant Governor in Council considers advisable, including, without limitation, terms

(a) specifying the amount of surplus electricity that is to be supplied to the business and the amount of that surplus electricity that is to be supplied at a development power rate,

(b) setting the development power rate for the surplus electricity to be supplied to the business, and

(c) specifying the period or periods during which the surplus electricity is to be supplied or the development power rate is to be applicable.

Customers outside the area of the authority

6 (1) On application by a business, the Lieutenant Governor in Council may, by order, authorize the authority to dispose of surplus electricity to another public utility to enable the public utility to supply electricity to the business for the purpose of a plant or operations if

(a) the plant is or the operations are located in the service area of that public utility, and

(b) the business would be eligible for an order under section 3 were the plant or operations located in the service area of the authority.

(2) If electricity is supplied to a public utility under subsection (1), the Lieutenant Governor in Council may order that the public utility supply some or all of the electricity to that business at a development power rate.

(3) If a municipality or regional district supplies electricity to customers within its own boundaries, an order may be made under subsections (1) and (2) in respect of that service as though the municipality or regional district were a public utility referred to in subsection (1).

Effect of development power rates

7 (1) If there is a conflict between the rates of the authority and an order made under section 3 or 6, the order prevails.

(2) A development power rate that is payable in accordance with the terms of an order made under section 3 or 6 is applicable, despite sections 61(3) and 63 and Part 5 of the *Utilities Commission Act*.

(3) The British Columbia Utilities Commission does not have jurisdiction under section 58(1) and (2), 59(4), 64(1) or Part 5 of the *Utilities Commission Act* in respect of a development power rate.

(4) A development power rate

(a) is lawful, enforceable and collectable and

(b) is not a rate to which section 59(1) of the *Utilities Commission Act* applies.

(5) The government, the authority and any public utility are not subject to Part 3 or Part 5 of the *Utilities Commission Act* in relation to any matter arising out of the supply of electricity with respect to which an order has been made under section 3 or 6 of this Act, unless the Lieutenant Governor in Council orders that a provision of Part 3 or Part 5 of the *Utilities Commission Act* that the Lieutenant Governor in Council specifies applies with respect to that matter.

(6) If there is any conflict or inconsistency between

(a) an order made under section 6(1) and (2) for the purposes of section 6(3), and

(b) either

(i) section 363 *(imposition of fees and charges)* of the *Local Government Act*, or any bylaw made under that section, or

(ii) section 194 *(municipal fees)* or 200 *(parcel tax bylaw)* of the *Community Charter*, or any bylaw made under those sections,

the order made under section 6 (1) and (2) prevails.

(7) The wholesale transmission rates otherwise payable by those customers of the authority that transmit power under published wholesale transmission rates must not be altered to compensate for

(a) an order made under section 3 or 6, or

(b) any reduction in the wholesale transmission revenue requirement resulting from that order.

Application to the administrator

8 A business wishing to be considered for an order under section 3 or 6 must apply to the administrator for that order.

PART 3 — POWER FOR JOBS ADMINISTRATOR

Administrator's mandate

9 (1) If the Lieutenant Governor in Council determines that surplus electricity may be made available under this Act, the minister may notify the administrator of

(a) the projected amount and duration of supply of that surplus electricity,

(b) any criteria, additional to the application evaluation criteria prescribed under section 15(2)(a), that the Lieutenant Governor in

Council intends to use in assessing applications for that surplus electricity, and

(c) the manner in which the assessment required under subsection (2) is to be completed.

(2) After receiving notification under subsection (1), the administrator must assess if and to which businesses the surplus electricity should be provided.

(3) In conducting an assessment under subsection (2), the administrator,

(a) if notified by the minister under subsection (1)(c) as to the manner in which the assessment is to be completed, must conduct the assessment in accordance with that manner, or

(b) in any other case, may use any method that the administrator considers advisable to effect the assessment, including, without limitation, any one or more of the following:

(i) advertising the amount of surplus electricity that may be made available by the Lieutenant Governor in Council;

(ii) preparing a request for proposals and distributing it to any businesses that the administrator considers appropriate;

(iii) using auction processes;

(iv) negotiating with businesses;

(v) conducting financial or other evaluations of solicited and unsolicited proposals.

(4) If the administrator issues a request for proposals in respect of surplus electricity, the administrator must include in the request for proposals the ad-

ditional criteria, if any, referred to in subsection (1)(b) that the Lieutenant Governor in Council intends to use in assessing proposals or other applications for that surplus electricity.

(5) After receiving a proposal or other application for the provision to a business of surplus electricity under this Act, whether or not that application is provided in response to an action of the Lieutenant Governor in Council or the administrator, the administrator must make recommendations to the minister as to whether the application should be accepted and may suggest terms that the administrator considers should be imposed on the supply of that surplus electricity.

(6) If a proposal or other application in respect of which recommendations are made under subsection (5) appears to the minister to be consistent with the criteria to be applied by the Lieutenant Governor in Council in assessing the application, the minister is to provide the application and the recommendations of the administrator to the Lieutenant Governor in Council for assessment.

(7) The minister is to notify the administrator as to the disposition of the application and the administrator must notify the applicant as to that disposition.

(8) The administrator may, when invited to do so by the Job Protection Commissioner and authorized to do so by the minister, consult with the Job Protection Commissioner in respect of any economic plan made or proposed under the *Job Protection Act* and may, if it appears appropriate to do so, recommend to the Lieutenant Governor in Council that an order be made under section 3 or 6 of this Act in order to assist in the economic plan.

Considerations administrator is to consider

10 In carrying out the mandate under section 9, the administrator is to give due consideration to economic, environmental and societal interests including, without limitation,

(a) any new employment relationships that may be established as a result of this Act,

(b) government objectives with respect to employment equity,

(c) the economic importance of a business to British Columbia or to a region or locality within British Columbia, and

(d) the purpose of this Act.

Confidentiality

11 The administrator and every other person who has custody of or access to records or information provided by a business in a proposal or other application provided to the administrator under this Act must not disclose the records or information to any person except insofar as disclosure is

(a) necessary for the purposes of this Act,

(b) required by a court proceeding relating to this Act, or

(c) for the purposes of the compilation and publication of statistical information by the government.

No testimony in civil action

12 The administrator is not, in a civil action to which the administrator is not a party, required to testify or produce evidence about records or information obtained in the discharge of duties under this Act.

Report to Lieutenant Governor in Council

13 The administrator, in each year, must make to the Lieutenant Governor in Council a report of

the activities of the administrator for the preceding calendar year.

PART 4 — GENERAL PROVISIONS

Offence

14 (1) A person who contravenes section 11 commits an offence.

(2) Section 5 of the *Offence Act* does not apply in respect of this Act or the regulations.

Power to make regulations

15 (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations

(a) respecting the criteria that may be applied by the Lieutenant Governor in Council in assessing a proposal or other application for an order under section 3 or 6, including, without limitation, the tests that may be applied by the Lieutenant Governor in Council in determining if and to what extent an order may be made under those sections, and

(b) prescribing the information that must be contained in a proposal or other application under section 3 or 6.

Commencement

16 This Act comes into force by regulation of the Lieutenant Governor in Council.

PROVINCE OF BRITISH COLUMBIA
ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL

Order in Council No. 494 *Approved and Ordered March 30, 2000*

/s/ [Illegible]
Administrator

Executive Council Chambers, Victoria

On the recommendation of the undersigned, the Administrator, by and with the advice and consent of the Executive Council, orders that the Special Directive No. 4 attached to this order is issued to the British Columbia Hydro and Power Authority.

/s/ [Illegible]
Minister of Energy and Mines and Minister Responsible for Northern Development

/s/ [Illegible]
Presiding Member of the Executive Council

(This part is for administrative purposes only and is not part of the Order)

Authority under which Order is made:

Act and section: *Hydro and Power Authority Act*, s. 35

Other (specify):

March 21, 2000 496/2000/13

SPECIAL DIRECTIVE NO. 4 TO THE BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Application

1 This Special Directive is issued by the Lieutenant Governor in Council to the British Columbia Hydro and Power Authority ("B.C. Hydro") under authority of section 35 of the *Hydro and Power Authority Act* (the "Act") as it pertains to annual payments to the provincial government of an amount specified in this Special Directive.

Return on public investment

2 For the purpose of this Directive only, the following definitions shall apply:

"**Commission**" means the British Columbia Utilities Commission constituted under the *Utilities Commission Act*;

"**debt**" means the sum of revolving borrowings, bonds, notes and debentures, net of related sinking funds, temporary investments, term debentures receivable and repurchased debt, at the end of the financial year;

"**distributable surplus**" means consolidated net income from all sources including electricity trade income as comp ed by B.C. Hydro according to generally accepted accounting principles and confirmed by B.C. Hydro's external auditors,

(a) after any rate stabilization account transfers pursuant to paragraphs 3 and 4 and before any deduction for any amounts paid or payable in accordance with a directive issued under section 35 of the *Hydro Power and Authority Act*, and

(b) less interest during construction adjusted for depreciation to prevent double counting;

"equity" means the sum of retained earnings and deferred credits, at the end of the financial year;

"deferred credits" means the sum of the rate stabilization account, deferred revenue, contributions arising from the Columbia River Treaty and contributions in aid of construction at the end of the financial year.

3 If the consolidated net income, before any rate stabilization account transfers, is less than the amount needed by B.C. Hydro to achieve an annual rate of return on equity pursuant to Special Directive No. 8 to the Commission, then the consolidated net income shall be increased accordingly by an appropriate transfer from the rate stabilization account, provided,

(a) there is a positive balance in the rate stabilization account before the transfer,

(b) there is a zero or positive balance in the rate stabilization account after the transfer, and

(c) the debt/equity ratio of B.C. Hydro after the transfer is not greater than 80:20.

4 If the consolidated net income, before any rate stabilization account transfers, is greater than the amount needed by B.C. Hydro to achieve an annual rate of return on equity pursuant to Special Directive No. 8 to the Commission, then the consolidated net income shall be decreased accordingly by an appropriate transfer to the rate stabilization account.

5 On or before June 30 of each year, the B.C. Hydro Board of Directors shall confirm a payment to the

provincial government (the "payment") for the previous financial year as determined below.

6 The payment shall equal 85 percent of the distributable surplus for the financial year provided the debt/equity ratio of B.C. Hydro after deducting the payment is not greater than 80:20. If the payment would result in the debt/equity ratio exceeding 80:20, then the payment shall be reduced to the extent necessary to maintain the debt/equity ratio at 80:20 after deducting the payment.

7 The payment determined by paragraph 6 shall be paid into the provincial government's consolidated revenue fund by no later than June 30 each year.

8 This directive is effective for the financial year ending March 31, 2000, and all subsequent financial years.

Revocation of Special Directive No. 2

9 This Special Directive revokes and replaces Special Directive No. 2 dated November 13, 1992.

B.C. Reg. 71/98, deposited March 16, 1998, pursuant to the **UTILITIES COMMISSION ACT** [Section 3.1]. Order in Council 1684/92, approved and ordered November 13, 1992.

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that

1. The Special Direction No. 8 attached to this order is issued to the British Columbia Utilities Commission, and

2. Special Direction No. 3 of October 5, 1989 to the British Columbia Utilities Commission is revoked. — A. EDWARDS, *Minister of Energy, Mines and Petroleum Resources*; M. HARCOURT, *Presiding Member of the Executive Council.*

SPECIAL DIRECTION No. 8

TO THE BRITISH COLUMBIA UTILITIES COMMISSION

Application

1. This Special Direction is issued by the Lieutenant Governor in Council to the British Columbia Utilities Commission (the "Commission") under authority of Section 3.1 of the *Utilities Commission Act* (the "Act") with respect to the exercise of the Commission's powers and functions as they apply to the British Columbia Hydro and Power Authority ("B.C. Hydro").

Definitions

2. For the purpose of this Special Direction only, the following definitions shall apply:

   (a) **"debt"** means the sum of revolving borrowings, bonds, notes and debentures, net of related sinking funds, temporary investments, term debentures receivable and repurchased debt, at the end of the financial year.

(b) **"deferred credits"** means the sum of the Rate Stabilization Account, deferred revenue, contributions arising from the Columbia River Treaty and contributions in aid of construction.

(c) **"equity"** means the sum of retained earnings and deferred credits, at the end of the financial year.

(d) **"total invested capital"** means debt plus equity, at the end of the financial year.

Conservation and Efficient Electricity Use

3. In designing B.C. Hydro electricity rates, the Commission shall ensure that those rates contribute to conservation and efficient electricity use by reflecting the total cost of new sources of electricity supply, and those costs shall be evaluated using a cost of capital consistent with that earned on a pre-income tax basis by the most comparable investor-owned energy utility regulated under the Act.

Basis for Establishing Revenue Requirements

4. In order to determine an appropriate basis for establishing B.C. Hydro revenue requirements and a fair and reasonable return for B.C. Hydro comparable to, and competitive with, returns earned on total invested capital by investor-owned utilities, the Commission must allow B.C. Hydro to generate sufficient revenues in each financial year to:

(a) sustain an operating and capital regime that continues to provide a quality and reliable electricity service;

(b) meet other expenses reasonably incurred in accordance with government policy directives;

(c) meet all debt service, tax, and other financial obligations; and,

(d) achieve an annual rate of return on equity equal to that allowed on a pre-income tax basis by the most comparable investor-owned energy utility regulated under the Act.

5. The return on equity in paragraph 4(d) must be calculated using consolidated operating income from all sources before any Rate Stabilization Account transfers, where projections of consolidated operating income include an amount of electricity trade income consistent with the Commission's forecast of annual net export revenue under average water conditions, as contained in the Commission's report to the Lieutenant Governor in Council dated June 30, 1992, as amended, on B.C. Hydro's Energy Removal Certificate application.

Smooth, Stable and Predictable Rate Increases

6.1 Notwithstanding paragraph 4(d), in setting B.C. Hydro electricity rates, the Commission shall ensure that rates are smooth, stable and predictable.

6.2 Smooth, stable and predictable rates for the purpose of setting B.C. Hydro electricity rates means that, with the exception of pass through items pursuant to Section 67(4) of the Act, general electricity rate increases shall not exceed 1 percentage point above the rate of inflation for the remainder of the 1992/93 financial year and shall not exceed 2 percentage points above the projected rate of inflation on a year over year basis thereafter.

6.3 For the purpose of implementing rate design or of closing rates, individual electricity rate increases may exceed the limits set out in paragraph 6.2.

6.4 The rate of inflation in paragraph 6.2 means the change in the average level of the British Columbia consumer price index during the most recent three month period for which published statistics are available prior to B.C. Hydro's rate application fil-

ing, compared to the average level of the British Columbia consumer price index during the same three month period a year earlier, and published statistics shall mean those published by Statistics Canada.

6.5 The projected rate of inflation in paragraph 6.2 means the provincial Ministry of Finance and Corporate Relations' latest available forecast published prior to B.C. Hydro's rate application filing of future year over year changes in the average level of the British Columbia consumer price index.

Fair, Just and Reasonable Rates

7.1 In setting B.C. Hydro electricity rates the Commission shall ensure that rates are fair, just and reasonable.

7.2 Notwithstanding Part 3 of the Act or any previous decision of the Commission, fair, just and reasonable rates for the purpose of setting B.C. Hydro electricity rates means rates set in accordance with this Special Direction.

Return on Public Investment

8. Electricity rates set by the Commission in accordance with this Special Direction may generate annual distributable surpluses for B.C. Hydro. These surpluses shall only be calculated and allocated in a manner specified by the Lieutenant Governor in Council pursuant to Section 54.1(a) of the *Hydro and Power Authority Act*.

This Special Direction revokes and replaces Special Direction No. 3 of October 5, 1989.

B.C. Reg. 72/98, deposited March 16, 1998, pursuant to the **UTILITIES COMMISSION ACT** [Section 3(2)]. Order in Council 1279/97, approved and ordered November 25, 1997.

On the recommendation of the undersigned, the Administrator, by and with the advice and consent of the Executive Council, orders that Special Direction No. 8 of November 13, 1992, issued to the British Columbia Utilities Commission, is amended as set out in the attached Schedule. — D. MILLER, *Minister of Employment and Investment*; G. CLARK, *Presiding Member of the Executive Council.*

SCHEDULE

1. Section 1 of Special Direction No. 8 of November 13, 1992, issued to the British Columbia Utilities Commission, is amended by striking out "as they apply to" and substituting "in regulating and fixing rates for".

2. Section 2 is amended by adding the following paragraph:

   (c.1) "government policy directive" means a directive in writing to B.C. Hydro from the minister charged with the administration of the *Hydro and Power Authority Act*;

3. Section 4 is amended

   (a) by striking out "In order to determine an appropriate basis for establishing B.C. Hydro revenue requirements and a fair and reasonable return for B.C. Hydro comparable to, and competitive with, returns earned on total invested capital by investor-owned utilities, the" and substituting "The", and

   (b) by repealing paragraph (b) and substituting the following:

(b) meet other expenses reasonably incurred in accordance with government policy directives including, but not limited to,

(i) directives for the construction or operation of a plant or system, or an extension to either of them, by B.C. Hydro, and

(ii) directives that B.C. Hydro enter into contracts.

4. The following section is added:

Government policy directives

9. The Commission must determine any matter respecting B.C Hydro in a manner that permits B.C. Hydro to undertake any construction, enter into any contract or modify its rates in a manner that complies with any government policy directive.

B.C. Reg. 73/98, deposited March 16, 1998, pursuant to the **UTILITIES COMMISSION ACT** [Section 3]. Order in Council 316/98, approved and ordered March 13, 1998.

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that Special Direction No. 8 of November 13, 1992 to the British Columbia Utilities Commission is amended as set out in Schedule to this order. — M. FARNWORTH, *Minister of Employment and Investment and Minister Responsible for Housing*; J.K. MACPHAIL, *Presiding Member of the Executive Council.*

SCHEDULE

1. Sections 1 and 2 of Special Direction No. 8 of November 13, 1992, issued to the British Columbia Utilities Commission, are repealed and the following substituted:

Definitions

1. In this Special Direction:

"Act" means the *Utilities Commission Act*;

"B.C. Hydro" means the British Columbia Hydro and Power Authority;

"Commission" means the British Columbia Utilities Commission;

"debt" means the sum of revolving borrowings, bonds, notes and debentures, net of related sinking funds, temporary investments, term debentures receivable and repurchased debt, at the end of the financial year;

"deferred credits" means the sum of the Rate Stabilization Account, deferred revenue, contributions arising from the Columbia River Treaty and contributions in aid of construction;

"equity" means the sum of retained earnings and deferred credits, at the end of the financial year;

"government policy directive" means a directive in writing to B.C. Hydro from the minister charged with the administration of the *Hydro and Power Authority Act*;

"total invested capital" means debt plus equity, at the end of the financial year.

Application

2. This Special Direction is issued to the Commission under section 3 of the *Utilities Commission Act*.

2. Section 4 is amended by striking out "The commission must allow B.C. Hydro to generate" and substituting "In determining whether the rates of B.C. Hydro are sufficient to yield a fair and reasonable compensation for the services provided by it, or a fair and reasonable return on the appraised value of its property, the Commission must ensure the rates permit B.C Hydro to collect".

3. Section 6.2 is amended by striking out "Section 67(4)" and substituting "section 61(4)".

4. Section 7.2 is repealed.

5. Section 8 is amended by striking out "Section 54.1(a)" and substituting "section 35".

6. Section 9 is repealed.

B.C. Reg. 119/2000, deposited March 31, 2000, pursuant to the **UTILITIES COMMISSION ACT** [Section 3]. Order in Council 493/2000, approved and ordered March 30, 2000.

On the recommendation of the undersigned, the Administrator, by and with the advice and consent of the Executive Council, orders that B.C. Reg. 71/98, Special Direction No. 8 to the British Columbia Utilities Commission, is amended as set out in the Schedule to this order. — G. WILSON, *Minster of Employment and Investment*; U. DOSANJH, *Presiding Member of the Executive Council*.

SCHEDULE

1. The definition of "deferred credits" in section 1 of B.C. Reg. 71/98, Special Direction No. 8 to the British Columbia Utilities Commission, is amended by striking out "construction;" and substituting "construction at the end of the financial year,".

2. Section 5 is repealed and the following substituted:

Calculation of return on equity

5 (1) The return on equity in paragraph (4)(d) must be calculated using consolidated net income from all sources,

(a) where projections of consolidated net income include an amount of electricity trade income consistent with the Commission's forecast of annual net export revenue under average water conditions, as contained in the Commission's report to the Lieutenant Governor in Council dated June 30, 1992, as amended on B.C. Hydro's Energy Removal Certificate application, and

(b) where projected consolidated net income, before any rate stabilization account

transfers, is less than the amount needed by B.C. Hydro to achieve an annual rate of return on equity pursuant to paragraph 4(d), an allowance for an appropriate transfer from the rate stabilization account provided

(i) there is projected to be a positive balance in the rate stabilization account before the transfer,

(ii) there is projected to be a zero or positive balance in the rate stabilization account after the transfer, and

(iii) the debt/equity ration of B.C. Hydro after the transfer is not greater than 80:20.

PROVINCE OF BRITISH COLUMBIA

2nd Session, 34th Parliament

OFFICIAL REPORT OF

DEBATES OF THE LEGISLATIVE ASSEMBLY

(HANSARD)

Monday, June 27, 1988

Afternoon Sitting

Volume 10, Number 16

THE HONOURABLE J. D. REYNOLDS, SPEAKER

[Page 5408]

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UTILITIES COMMISSION AMENDMENT ACT, 1988

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[Page 5411]

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HON. MR. DAVIS: First, I would like to address a concern expressed by the member from Vancouver East about the export of electricity. British Columbia to date has never exported electricity on a long-term basis. It has for several decades exported surplus capacity when there was a market in the United States, or indeed when B.C. Hydro and before it B.C. Electric has a surplus. There are occasions when the Americans don't need any power at all, but in recent years they've taken modest amounts in some years and very large amounts in others.

An argument has been made for always having some excess capacity in British Columbia because the excess or the surplus could be sold on a short-term basis if our own needs didn't rise as rapidly as had been forecast. It's been more a fail-safe system of selling short term. There's been a lot of talk, particularly in the last decade, of long-term sales in the United States. The opportunity still hasn't really arisen for long-term sales to be made. It will arise, I am reasonably confident, in the 1990s or certainly after the year 2000.

Unlike the situation in eastern Canada and in the Midwest, the price of electricity immediately south of British Columbia has in general been less than the average price in British Columbia. It's very difficult to export into an area where the price is less than your average cost. Those circumstances are changing; average cost in the U.S. Pacific Northwest today is roughly comparable, roughly equal to B.C. Hydro's average cost and is rising rapidly. If ever they begin to pay off the cost of incomplete nuclear

power plants in the northwest, the rates in the U.S. will be well above ours, and then the opportunity genuinely does exist, at least on a price basis.

Naturally, utilities in the United States build their own capacity if they can, so there's not necessarily a market in California. Generally speaking, new power plants use oil or natural gas. The nuclear alternative now seems to have been precluded. Power from those sources is more expensive, certainly, than average costs in Canada. So long-term, there should be an opportunity to export.

The export opportunity, I think, however, should be as much as possible separated from the service to British Columbians. The service in B.C. – largely provided by B.C. Hydro, but also to a lesser extent by West Kootenay Power and others – is a monopoly-type service and must be regulated, and rates, generally speaking, are equal to average cost. In no way should we include in average costs new plants, which may be more expensive, particularly if they are built substantially to serve an export market. An export agency, I think, is desirable. It will begin its life this summer as a subsidiary of B.C. Hydro, simply because Hydro has the personnel and the expertise to do that kind of work without adding unduly to personnel.

In the longer term, I think that agency should not be seen as a child or a part of Hydro. It should deal with long-term export opportunities. The reason for creating an agency – a single marketing desk, if I can describe it that way – is merely to drive a good bargain in the U.S.A. and not have competing B.C. or Canadian projects vying with each other on the U.S. side of the line. We sell from strength, in other words.

That agency would first have to have obtained firm markets of firm contractual commitment to an income flow, and then would turn around and call for tenders in British Columbia. There will be a variety of expressions of interest. I suppose the majority would be private. It's

conceivable that Hydro itself might put forward a project which is seen to be surplus for at least several decades to B.C.'s own needs, but is put forward as a non-regulated project – certainly not regulated in its service to British Columbians, but simply a project which can make a profit.

This single-desk agency would have to see a larger income from sales than the costs on the Canadian side. In other words, that operation would have to be profitable.

* * * * *

No. 05-584

Supreme Court, U.S.
FILED
MAR 3 - 2006
OFFICE OF THE CLERK

In The Supreme Court of the United States

POWEREX CORP., a Canadian Corporation, dba POWEREX ENERGY CORP.,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA ex rel. BILL LOCKYER, Attorney General of the State of California,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
TOM GREENE
Chief Assistant Attorney General
MANUEL M. MEDEIROS
State Solicitor General
MARK J. BRECKLER
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QUESTIONS PRESENTED

The questions, as framed by Petitioner, are as follows:

1. Whether an entity that is wholly and beneficially owned by a foreign state's instrumentality, that engages in energy trade on behalf of the foreign state, and that performs international treaty and trade agreement obligations for the benefit of the foreign state, may nonetheless be denied status as an "organ of a foreign state" under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1603(b)(2), based on an analysis of sovereignty that ignores the circumstances surrounding the entity's creation, conduct, and operations on behalf of its government.

2. Whether an entity is an "agency or instrumentality of a foreign state" under the FSIA, 28 U.S.C. § 1603(b)(2), when its shares are completely owned by a governmental corporation that, by statute, performs all of its acts as the agent of the foreign sovereign.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT	1
REASONS FOR DENYING THE PETITION	3
A. The Questions Presented by Petitioner Are Not Appropriate For Review Because the Court of Appeals Did Not Address The Issue, Having Dismissed The Appeal For Lack of Appellate Jurisdiction	3
B. The Court Lacks Jurisdiction to Review Directly the Merits of the District Court's Remand Order	5
C. The Dispute Has Been Rendered Moot by Subsequent State Court Proceedings	6
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 7

Bunting v. Mellen, 541 U.S. 1019, 124 S.Ct. 1750 (2004) 8

California ex rel. Lockyer v. F.E.R.C., 383 F.3d 1006, *pet. for rehearing filed* (No. 02-73093, 9th Cir. Oct. 24, 2004) 2

California v. NRG Energy, Inc., 391 F.3d 1011 (9th Cir. 2004) 2

Church of Scientology of Cal. v. United States, 506 U.S. 9 (1992) 7

City News & Novelty, Inc. v. City of Waukesha, 531 U.S. 278 (2001) 8

Gravitt v. Southwestern Bell Telephone Co., 430 U.S. 723 (1977) 6

McGraw-Hill Co., Inc. v. Procter & Gamble Co., 515 U.S. 1309 (1995) 4

National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999) 4

Roberts v. Galen of Virginia, Inc., 525 U.S. 249 (1999) 4

Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976), *abrogated on other grounds by Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996) 5-6

Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995) 3, 4, 5

TABLE OF AUTHORITIES – Continued

Page

United States v. Williams, 504 U.S. 36 (1992) 4

Volvo of America Corp. v. Schwarzer, 429 U.S. 1331 (1976) 6

CONSTITUTION

U.S. Const. art. III, § 2 6

STATUTES

15 U.S.C. § 29(b) 5

16 U.S.C. § 825p 2

28 U.S.C.
§ 1253 5
§ 1254 3
§ 1254(1) 1
§ 1257 3
§ 1447(d) 1, 3, 4, 5, 6
§ 1603(b)(2) 2

California Business & Professions Code § 17200 et seq. 2

California Corporations Code § 29500 et seq. 2

OTHER AUTHORITIES

13A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3533.2, p. 241 (2nd ed. 1984) 7

R. Stern, E. Gressman, S. Shapiro, & K Geller, Supreme Court Practice § 2.7 (8th ed. 2002) 5

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is unpublished. The decision of the district court (Pet. App. 4a-15a) is not reported in Federal Supplement, but is available at 2005 WL 2030718.

JURISDICTION

The order and judgment of the court of appeals (Pet. App. 1a) was entered on October 6, 2005. A motion to stay the mandate pending a petition for a writ of certiorari was denied on January 19, 2006. The petition for a writ of certiorari was filed on November 4, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioner has set forth relevant treaty and statutory provisions at Pet. App. 50a-202a. In addition, 28 U.S.C. § 1447(d) provides, in pertinent part: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . ."

STATEMENT

During the California Energy Crisis of 2000 and 2001, "the California energy market was subjected to artificial manipulation on a massive scale," and "California consumers were subjected to a variety of market machinations . . . coupled with manipulative corporate strategies."

California ex rel. Lockyer v. F.E.R.C., 383 F.3d 1006, 1014-15, *pet. for rehearing filed* (No. 02-73093, 9th Cir. Oct. 24, 2004). Petitioner Powerex Corp., a Canadian corporation, was a participant in the California energy market leading up to and during the crisis.

In 2004, the Attorney General of California filed a complaint against Petitioner, alleging that, during the relevant period, Petitioner employed various "gaming" strategies and manipulated the California energy market in violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*, and the California Commodity Law, Cal. Corp. Code § 29500 *et seq.* The complaint sought remedies authorized under state law.

Petitioner removed the Attorney General's state law action to federal court, invoking federal jurisdiction under the Federal Power Act, 16 U.S.C. § 825p, and the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* The Attorney General moved for a remand on the ground that the district court lacked subject-matter jurisdiction.

The district court granted the Attorney General's motion and remanded the case to state court. The district court concluded that removal was improper because federal subject-matter jurisdiction was lacking. Pet. App. 15a. The district court reasoned that the complaint did not seek to enforce any liability or duty created by the Federal Power Act. Pet. App. 6a-14a. The district court further reasoned that Petitioner was not an organ of a foreign state for purposes of the FSIA and that the holding in *California v. NRG Energy, Inc.*, 391 F.3d 1011, 1026 (9th Cir. 2004), to the effect that Petitioner was not a foreign sovereign under the FSIA, was dispositive and indistinguishable from the instant case. Pet. App. 14a-15a.

Petitioner requested in the district court a stay of the remand order pending its appeal of the remand order to the court of appeals. The district court denied the stay request.

Petitioner appealed the district court's remand order. In the court of appeals, Petitioner also moved to stay the district court's remand order pending appeal. Before the commencement of briefing on the merits of the appeal, the court of appeals ordered the parties to show cause why the appeal should not be dismissed for lack of appellate jurisdiction under 28 U.S.C. § 1447(d). Pet. App. 2a-3a. After reviewing the parties' responses, the court of appeals "dismiss[ed] the appeal for lack of jurisdiction," citing 28 U.S.C. § 1447(d) and *Things Remembered, Inc. v. Petrarco*, 516 U.S. 124, 128 (1995). Pet. App. 1a. All pending motions were denied as moot. *Ibid.*

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to review its status as a foreign sovereign under the FSIA. There are, however, significant jurisdictional barriers to granting plenary review here.

A. The Questions Presented by Petitioner Are Not Appropriate For Review Because the Court of Appeals Did Not Address The FSIA Issue, Having Dismissed The Appeal For Lack of Appellate Jurisdiction

This Court reviews on a writ of certiorari a decision of a United States court of appeals or a state court of last resort. *See* 28 U.S.C. §§ 1254, 1257. It is well-established

that this Court ordinarily will not grant certiorari to consider an issue that the court of appeals did not address. *See, e.g., National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 469 (1999) (stating generally that the Court does "not decide in the first instance issues not decided below"); *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253-254 (1999) (declining to address claims not considered below partially because the "claims do not appear to have been sufficiently developed below for us to assess them in any event"); *United States v. Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule . . . precludes a grant of certiorari only when the question presented was not pressed or passed upon below.") (internal quotation marks omitted). Even when a petitioner seeks review of a lower court's dismissal for want of jurisdiction, this Court's review is limited to whether "there is a substantial basis for concluding that the Court of Appeals erred, or [whether] four Justices of this Court would grant certiorari to review the jurisdictional issue." *McGraw-Hill Co., Inc. v. Procter & Gamble Co.*, 515 U.S. 1309, 1310 (Stevens, Circuit Justice 1995).

The court of appeals' order is straightforward and plain. Citing 28 U.S.C. § 1447(d) and *Things Remembered, Inc.*, 516 U.S. at 128, the court "dismiss[ed] the appeal for lack of jurisdiction." Pet. App. 1a. The court of appeals did not reach the merits of the questions that Petitioner presents to this Court for review, having determined that it lacked appellate jurisdiction under 28 U.S.C. § 1447(d). Because the court of appeals did not decide the merits of the questions that Petitioner presents here, this Court should not review them, either. *See National Collegiate Athletic Ass'n*, 525 U.S. at 469; *McGraw-Hill Co.*, 515 U.S. at 1310-11.

B. The Court Lacks Jurisdiction to Review Directly the Merits of the District Court's Remand Order

The court of appeals "dismiss[ed] the appeal for lack of jurisdiction" pursuant to 28 U.S.C. § 1447(d). Pet. App. 1a. Petitioner does not seek review of that jurisdictional issue. *See* Pet. i. (questions presented); *cf. Things Remembered, Inc.*, 516 U.S. at 125 ("We decide in this case whether a federal court of appeals may review a district court order remanding a bankruptcy case to state court on grounds of untimely removal."); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976), *abrogated on other grounds by Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996) ("The issue before us now is whether § 1447(d) also bars review where a case has been properly removed and the remand order is issued on grounds not authorized by § 1447(c)."). Instead, Petitioner asks this Court to review the merits of the underlying district court's remand order in the first instance. But direct review of the district court's order is not within this Court's appellate jurisdiction. *See* 15 U.S.C. § 29(b), 28 U.S.C. § 1253; *see also* R. Stern, E. Gressman, S. Shapiro, & K Geller, Supreme Court Practice § 2.7 (8th ed. 2002) (discussing limited circumstances where direct appeals from federal district courts to the Supreme Court).

Moreover, inasmuch as the district court expressly remanded for lack of federal subject-matter jurisdiction (Pet. App. 15a), the remand order is no more reviewable by this Court than it was by the court of appeals. *See* 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal *or otherwise*. . . ." (emphasis added)); *see also Thermtron Products, Inc.*, 432 U.S. at 361 (Rehnquist, J.,

dissenting) ("Congress decided to place final responsibility for implementation of its removal scheme with the district courts. It is not for this Court to strike that balance anew."); *Volvo of America Corp. v. Schwarzer*, 429 U.S. 1331, 1333 (Rehnquist, Circuit Justice, 1976) (concluding that four Justices would not find district court's remand order to be reviewable, even if district court was wrong in its analysis).

Petitioner asserts that the court of appeals' dismissal "was not based on the general rule that an appellate court lacks jurisdiction under § 1447(d) to review an order of remand." Pet. 12 n.9. But the court of appeals' order *expressly* relies on 28 U.S.C. § 1447(d) as the basis for dismissal. Pet. App. 1a. Moreover, even under Petitioner's reasoning, it would remain undisputed that the district court remanded for lack of subject-matter jurisdiction, which perforce precludes appellate review under 28 U.S.C. § 1447(d). *See Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723, 723-24 (1977) (per curiam) (holding that court of appeals erred when it reviewed and reversed the district court's remand order because the "remand order was plainly within the bounds of § 1447(c) and hence was unreviewable by the Court of Appeals, by mandamus or otherwise"). This jurisdictional obstacle renders this petition an unsuitable vehicle for considering Petitioner's status under the FSIA.

C. The Dispute Has Been Rendered Moot by Subsequent State Court Proceedings

Federal courts, including this Court, lack jurisdiction to entertain cases that no longer present actual live controversies. *See* U.S. Const. art. III, § 2. "[A]n actual

controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). A controversy becomes moot "[when] an event occurs while a case is pending on [review] that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party. . . ." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

Here, Petitioner filed a demurrer to the Attorney General's complaint in the state trial court after the district court remanded the case to state court. The state trial court has sustained the demurrer and has dismissed the Attorney General's action.[1] In light of the state trial court's supervening dismissal of the action against Petitioner, the constitutional requirement of a live controversy is no longer satisfied. Under the circumstances, a ruling on the merits of Petitioner's claim would be wholly advisory. *See Church of Scientology of Cal.*, 506 U.S. at 12 (stating that "a federal court has no authority to give opinions upon moot questions or abstract propositions"). Petitioner has obtained a favorable judgment from the state trial court. Thus, the case is moot, *see* 13A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3533.2, p. 241 (2nd ed. 1984) ("If full relief is accorded by another tribunal, a proceeding seeking the same relief is moot."), and the

[1] *People of the State of California ex rel. Bill Lockyer, Attorney General of the State of California v. Powerex*, Superior Court of the State of California, County of Sacramento, No. 04AS05129 (Dec. 22, 2005). The Attorney General has appealed from the state trial court's decision.

certiorari petition should be denied. *See Bunting v. Mellen*, 541 U.S. 1019, 124 S.Ct. 1750, 1751-52 (2004) (Stevens, J.) (denying certiorari petition partially based on mootness); *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 (2001) (dismissing writ of certiorari because of a change of circumstances after granting petition).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: March 3, 2006

Respectfully submitted,

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SUPREME COURT, U.S.

No. 05-584

In The
Supreme Court of the United States

POWEREX CORP., a Canadian Corporation,
dba POWEREX ENERGY CORP.,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA ex rel. BILL LOCKYER, Attorney General of the State of California,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

THERE IS NO REASON TO HOLD THE PETITION IN ABEYANCE IN LIGHT OF THIS COURT'S HOLDING IN *KIRCHER*

This brief is submitted in response to the brief filed by the United States as Amicus Curiae. As the United States' brief confirms, there is no reason to grant the certiorari petition in No. 05-584. There is also no reason for holding the petition in abeyance pending resolution of the certiorari petition in No. 05-85, because whatever the outcome in No. 05-85, the dismissal of the appeal in No. 05-584 was compelled by 28 U.S.C. § 1447(d).

1. Whereas in No. 05-85 the court of appeals concluded that it had appellate jurisdiction, the court in this case properly concluded that it did not have appellate jurisdiction and properly dismissed the appeal. The court here dismissed the appeal in clear and straightforward language. Citing 28 U.S.C. § 1447(d) and *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995), the court "dismiss[ed] [the] appeal for lack of jurisdiction." Pet. App. 1a; see also Pet. App. 2a (stating in the order to show cause that "this court may lack jurisdiction over the appeal because an order remanding a removed action to state court for lack of subject matter jurisdiction is not reviewable on appeal"). Although petitioner argues that the panel in this matter felt compelled to dismiss the appeal by virtue of another panel's earlier holding in No.

05-85,[1] that is not what the court said in its dismissal order.

Moreover, the argument is beside the point. Whether or not the panel decision at issue in No. 05-85 was binding on the panel whose decision is at issue in this petition, dismissal of the appeal here was mandated by § 1447(d) because the district court remanded the action to state court on the ground that "federal removal jurisdiction is lacking." Pet. App. 15a. In particular, the district court determined that petitioner does not qualify as a "foreign state" under the FSIA, thereby making a threshold determination of the court's subject matter jurisdiction. Pet. App. 14a; see also *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (stating that the FSIA provides "the sole basis for obtaining jurisdiction over a foreign state"). As this Court has made clear, "[i]f a trial judge purports to remand a case on the ground that it was removed 'improvidently and without jurisdiction' [under § 1447(c)], his order is not subject to challenge in the court of appeals." *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976), quoted in *Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145, 2153 (2006).

2. Accordingly, even were this Court in No. 05-85 to determine that the action there had been properly removed, that determination would not perforce call into question the propriety of the dismissal of the appeal in this matter. The district court here remanded for lack of jurisdiction, a ground specified in § 1447(c). Pet. App. 14a-15a. As the

[1] Thus the United States observes that there is "some dispute" between the parties as to the basis for the court's dismissal. Brief for the United States at 19.

Court has "relentlessly" reminded the lower courts, "'[w]here the order is based on one of the [grounds enumerated in 28 U.S.C. § 1447(c)], review is unavailable no matter how plain the legal error in ordering the remand.'" *Kircher*, 126 S. Ct. at 2153, 2154 (quoting *Briscoe v. Bell*, 432 U.S. 404, 413-14 n. 13 (1977)) (changes in original).

3. There is no other sound reason for holding the petition here in abeyance. Unlike BC Hydro in No. 05-85, petitioner here makes no claim of immunity from state-court jurisdiction under 28 U.S.C. § 1604; thus, the remand order here should not be reviewable under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Cf. *Osborn v. Haley*, No. 05-593, Brief for Respondent Barry Haley at 13.

The United States seems to suggest that the "collateral order doctrine" could extend to petitioner's appeal here on the theory that Congress intended to afford foreign states a federal forum and a trial without a jury. Brief for the United States at 20 n. 13. However, consistent with Congress's intent, petitioner *was* afforded a federal forum for the determination of its foreign-state status. Moreover, as noted above, petitioner makes no claim of immunity from suit such as informs the underlying rationale of the collateral order doctrine, and Congress has expressly declined to immunize foreign states from state-court jurisdiction in the circumstances presented in this case. 28 U.S.C. § 1605(a)(2). Furthermore, petitioner has never contended that it would be subject to a jury trial in proceedings under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq., or under the California Commodity Law, Cal. Corp. Code § 29500 et

seq., and respondent has not sought a jury trial in the state court proceedings.[1]

The United States' suggestion would distort the straightforward directive of § 1447(d) by engrafting onto a motion to dismiss an appeal under § 1447(d) a procedure for determining whether, under the state laws that govern the particular state-court action at issue, the defendant/appellant might irremediably be subject to a jury trial by virtue of an erroneous remand. Such case-by-case collateral analysis of state procedure by the appellate courts would only "'prolong[] litigation of questions of jurisdiction of the district court,'" *Kircher*, 126 S. Ct. at 2152 (quoting *United States v. Rice*, 327 U.S. 742, 751 (1946)), beyond that contemplated by the plain language of § 1447(d), in frustration of congressional intent to avoid delay of litigation on the merits by the state court – "an equally competent body," *id.* at 2156 (citing *Missouri Pacific R. Co. v. Fitzgerald*, 160 U.S. 556, 583 (1896)).

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[1] Moreover, as respondent has noted earlier, petitioner successfully obtained dismissal of respondent's state court action, see Brief for Respondent in Opposition at 7, and that dismissal is presently on appeal. If petitioner were to prevail on appeal before decision in No. 05-85, the instant petition will be rendered moot. But even if respondent were to prevail on appeal and the state court proceedings were returned to the trial court, if petitioner prevails in No. 05-85, petitioner can renew its claim of foreign state status in state court, see *Kircher*, 126 S. Ct. at 2157, to ensure that it suffers no procedural prejudice by virtue having to litigate in state court rather than federal court.

CONCLUSION

For the reasons stated herein and in respondent's earlier brief in opposition, the petition for a writ of certiorari should be denied.

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No. 05-584

IN THE
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POWEREX CORP., A CANADIAN CORPORATION,
DBA POWEREX ENERGY CORP.,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA
EX REL. BILL LOCKYER,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Statement pursuant to Rule 29.6 was set forth at page iii of the petition for a writ of certiorari, and there are no amendments to that Statement.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

ARGUMENT:

THIS COURT HAS JURISDICTION TO DECIDE THE ISSUES PRESENTED BY THE PETITION 2

A. The Court Of Appeals Resolved The Questions Presented For Review By Following Binding Circuit Precedent 2

B. The Court Of Appeals Had Jurisdiction Over Powerex's Appeal 4

C. Subsequent State Court Proceedings Have Not Rendered This Case Moot 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

California v. NRG Energy Inc., 391 F.3d 1011 (9th Cir. 2004), *petition for cert. pending*, No. 05-85 (docketed July 18, 2005) 3, 4, 5, 6, 8

City of Waco v. United States Fid. & Guar. Co., 293 U.S. 140 (1934) 4, 5

Davis v. International Union, UAW, No. 05-107 (U.S. Dec. 5, 2005) 6

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) 7

Gravitt v. Southwestern Bell Tel. Co., 430 U.S. 723 (1977) 5

Linton v. Airbus Indus., 30 F.3d 592 (5th Cir. 1994) 6

Powers v. Southland Corp., 4 F.3d 223 (3d Cir. 1993) 5

Roberts v. Galen of Virginia, Inc., 525 U.S. 249 (1999) 2

Stevens v. Brink's Home Sec., Inc., 378 F.3d 944 (9th Cir. 2004) 5

United States v. Rodriguez-Lara, 421 F.3d 932 (9th Cir. 2005) 3

United States v. Munsingwear, Inc., 340 U.S. 36 (1950) 1, 8

USX Corp. v. Adriatic Ins. Co., 345 F.3d 190 (3d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004) 4

ADMINISTRATIVE ORDERS

Order Granting Rehearing for Further Consideration, *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, Docket Nos. EL00-95-171 *et al.* (FERC Feb. 22, 2006) 8

Order on Settlement Agreement, *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 113 FERC ¶ 61,308 (Dec. 22, 2005) 8

STATUTES

Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602 *et seq.*:

28 U.S.C. § 1608(d)-(e) 4

28 U.S.C. § 1609 4

Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 6

28 U.S.C. § 1391(f) 4

28 U.S.C. § 1441(d) 4

28 U.S.C. § 1447(d) 3, 4, 5

REPLY BRIEF FOR PETITIONER

This Court has now twice called for a response from private plaintiffs and the State of California (collectively "the California parties") to address Powerex's core allegations that (1) the Ninth Circuit has created a conflict with three other circuits on what test determines the foreign-sovereign status of a corporation that is created by foreign statute, is wholly owned by a statutory agent of the foreign government, and is controlled by foreign government officials; and (2) Powerex is unquestionably a foreign sovereign when the correct test is applied. In highly unusual certiorari stage *amicus* filings, Canada and British Columbia also strongly urge this Court to grant certiorari. To all this the California parties have absolutely nothing to say. In both this case and No. 05-85, they bring up supposed procedural difficulties to obscure their lack of any defense for the Ninth Circuit's holding on the merits or any rebuttal to the clear conflict created by the Ninth Circuit.

The California parties' arguments against certiorari in this case are particularly misplaced. Having created the mootness issue in No. 05-85 – the case in which the Ninth Circuit created the problem – and having conceded that Powerex did nothing to facilitate the mooting of that case, *see* No. 05-85 Br. in Opp. at 3, 6, they now claim other miscellaneous vehicle problems that would have the effect of denying Powerex any realistic opportunity of ever obtaining this Court's review of the Ninth Circuit's erroneous holding that Powerex is not a foreign sovereign. Because these supposed "vehicle" problems are in fact illusory, this Court should grant certiorari in this case. Alternatively, the Court should grant and vacate No. 05-85 under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), and then grant, vacate, and remand this case (and No. 05-1068) for the Ninth Circuit to reconsider Powerex's status as a foreign sovereign, particularly in light of the considered views of Canada and British Columbia. Should the Court be reluctant to take those steps at this

time, it should call for the views of the Solicitor General. As the confluence of these three certiorari petitions demonstrates, Powerex's sovereign status is clearly a recurring issue and one of significance in the bilateral relationship between the United States and Canada. The denial of Powerex's right to be treated as a foreign sovereign with the accompanying procedural protections of the FSIA means that Powerex will continue to be hauled into state courts in the Ninth Circuit (as it has in this case and No. 05-1068). Such treatment, in turn, raises significant issues between the United States and Canada, including the specter of bringing the United States into noncompliance with its obligations under the North American Free Trade Agreement. *See* Pet. 26-28.

THIS COURT HAS JURISDICTION TO DECIDE THE ISSUES PRESENTED BY THE PETITION

California asserts the existence of three obstacles to review by this Court, one discretionary and the other two jurisdictional. None provides a basis for denying the petition. First, this Court's practice of declining to review questions not passed on below is inapplicable here because the court of appeals reached the questions presented for review. Second, the court of appeals had appellate jurisdiction over this case because a district court's rejection of a claim of foreign-state status under the FSIA is appealable. Third, subsequent proceedings in state court have not mooted this case because California is appealing the dismissal of its suit.

A. The Court Of Appeals Resolved The Questions Presented For Review By Following Binding Circuit Precedent

California contends (Opp. 3-4) that this Court's practice of declining to review questions that were not decided by the lower court weighs against granting certiorari in this case. That practice – which is discretionary in any event, *see, e.g.*, *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253-54 (1999) (per curiam) ("declin[ing] to address" claims that did "not appear to have been sufficiently developed

below"), as California concedes (*see* Opp. 4) – does not apply here because the court of appeals reached and decided the questions presented in this petition, by following binding circuit precedent.

The Ninth Circuit panel that heard this case was bound by that circuit's prior decision in *California v. NRG Energy Inc.*, 391 F.3d 1011 (9th Cir. 2004) (Pet. App. 33a-49a). *See, e.g., United States v. Rodriguez-Lara*, 421 F.3d 932, 943 (9th Cir. 2005) (panel cannot overrule decisions of prior panels). The *NRG Energy* panel had rejected Powerex's FSIA claim, reaching and resolving against Powerex both of the questions presented in this petition. *See* Pet. App. 46a-48a. Additionally, the *NRG Energy* court held that the denial of a defendant's assertion of foreign-state status under the FSIA is reviewable on appeal. *See id.* at 42a. In this case, the court of appeals did not question that it would have possessed appellate jurisdiction to examine Powerex's status as a foreign sovereign as it had in *NRG Energy*. That point was fully briefed by Powerex to the court in response to its order to show cause why the appeal should not be dismissed.

California is therefore incorrect to assert (Opp. 4-6) that the court of appeals' decision was based on the general rule that an appellate court lacks jurisdiction under § 1447(d) to review an order of remand. Such a conclusion would have conflicted impermissibly with the binding precedent of *NRG Energy*. California makes no attempt to justify its presumption that the panel here cavalierly transgressed prior circuit authority without comment.

The only plausible interpretation of the court of appeals' brief order in this case is that the panel considered Powerex's contentions under the FSIA, but believed that those arguments had been foreclosed by *NRG Energy*'s conclusion that Powerex was not entitled to remove under that statute. Because the court found that the legal issues presented in this case had been resolved in *NRG Energy*, there was no live substantive issue separable from the remand order over which the panel could have

jurisdiction. Necessarily encompassed within the Ninth Circuit order dismissing the appeal, therefore, was the court's refusal to revisit the *NRG Energy* court's erroneous holding that Powerex is not a foreign sovereign. The Ninth Circuit's dismissal of this appeal was therefore based on its decision to adhere to *NRG Energy*'s rejection of Powerex's claim of foreign-state status under the FSIA, not on the general bar to appellate review in § 1447(d).

B. The Court Of Appeals Had Jurisdiction Over Powerex's Appeal

1. California also incorrectly asserts (Opp. 5-6) that this Court cannot review the FSIA rulings in this case because they accompanied an order of remand. In so asserting, California relies on § 1447(d), which codified the general rule that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). The Ninth Circuit correctly concluded in *NRG Energy* that § 1447(d) does not prevent appellate review of a district court's resolution of a removing party's claim to foreign-state status under the FSIA. *See* Pet. App. 46a-48a.

Under this Court's decision in *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934), legal determinations that "precede[]" an order of remand "in logic and in fact" and that are "conclusive" can be reviewed on appeal, despite the general rule barring appellate review of remand orders. *Id.* at 143. A conclusion that a foreign entity is not an "instrumentality of a foreign state" under the FSIA fits the *City of Waco* criteria for two reasons. First, the FSIA confers "particularized procedural" rights on foreign sovereigns beyond jurisdiction, including extended time to answer a complaint, protections against default, limitations on remedies, special venue rules, and the right to a non-jury trial before a federal judge. *See USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 207 (3d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004); 28 U.S.C. §§ 1391(f), 1441(d), 1608(d)-(e), 1609. Consequently, the rejection of an FSIA claim has "independent

relevance in adjudging the rights of the parties," *Powers v. Southland Corp.*, 4 F.3d 223, 227-28 (3d Cir. 1993), and therefore "precede[s]" the decision to remand, *City of Waco*, 293 U.S. at 143.

Second, denial of foreign-state status under the FSIA is "functionally unreviewable in state court[]," *Stevens v. Brink's Home Sec., Inc.*, 378 F.3d 944, 946 (9th Cir. 2004) (internal quotation marks omitted), because the state court on remand is not empowered to afford a foreign entity any of the procedural and jurisdictional protections to which it is entitled under the FSIA. Such denials are therefore "conclusive" under *City of Waco*, 293 U.S. at 143.

Accordingly, the rejection of an FSIA claim is a conclusive legal ruling preceding the decision to remand that can be reviewed on appeal consistent with § 1447(d).[1] Notably, California does not deny that Powerex properly preserved the question of its foreign-sovereign status in this case, that it properly preserved its challenge to the Ninth Circuit's erroneous holding in *NRG Energy*, and that Powerex would be able to remove this case to federal court if this Court were to reverse the Ninth Circuit.[2]

2. More importantly for the Court's consideration of this petition, the existence of that issue of appellate jurisdiction does not provide a reason for denying certiorari. If anything, it provides an additional reason to grant this petition, because the question independently merits this

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[1] Because the FSIA ruling is reviewable on appeal under *City of Waco* and is therefore not "within the bounds of § 1447(c)," *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, 723 (1977) (per curiam), it is irrelevant that the district court cited lack of jurisdiction in deciding to remand the case *after* it had resolved the FSIA question. *See* Pet. App. 14a-15a. *Gravitt* is thus inapposite.

[2] In No. 05-1068, the California Department of Water Resources ("CDWR") likewise filed suit in state court. A demurrer hearing is scheduled for June 1, 2006, at which point either the case will be dismissed and presumably appealed by CDWR or Powerex will be forced to litigate in state court – the very circumstances the FSIA was enacted to prevent.

Court's review. As noted in the Opposition in No. 05-85 (at 4), the courts of appeals are in conflict over the appealability of denials of FSIA claims that accompany remand orders. *Compare* Pet. App. 46a-48a *with*, *e.g.*, *Linton v. Airbus Indus.*, 30 F.3d 592 (5th Cir. 1994).

Further, the issue is an important one: the way in which federal courts treat FSIA claims has a significant effect on this country's foreign trade and international relations, as evidenced by the *amicus* briefs that Canada and the Province of British Columbia have filed urging this Court to grant certiorari and to reverse the Ninth Circuit's decision in *NRG Energy*. The lack of a uniform national rule permitting foreign entities that are denied the right to remove under the FSIA and to obtain appellate review threatens international comity. A single federal district judge should not have unreviewable authority to deny a foreign entity its right under the FSIA to a bench trial in federal court and to subject that entity to a jury trial in state court, particularly where a plaintiff in a subsequent suit against that entity might contend that the judge's ruling should be given issue-preclusive effect.

Although the Court need not feel obliged to resolve the important circuit conflict regarding the appealability of FSIA rulings that accompany remand orders, this case would provide the Court with an excellent opportunity to do so if it wished. In two cases this Term,[3] this Court has recognized the importance of providing clarity to issues addressing the appealability of remand orders. Those cases, however, will have no bearing on the appealability of FSIA rulings raised in this case. Because the issues

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[3] First, this Court has granted certiorari and will hear oral argument on April 24, 2006, in *Kircher v. Putnam Funds Trust*, No. 05-409, which involves the appealability of remand orders under the Securities Litigation Uniform Standards Act of 1998. Second, the Court has invited the Solicitor General to file a brief expressing the views of the United States in another case raising a question regarding the appealability of remand orders. *See* Order, *Davis v. International Union, UAW*, No. 05-107 (U.S. Dec. 5, 2005).

involved in this case implicate foreign-affairs concerns – foreign sovereigns litigating in United States courts are entitled to jurisdictional and procedural protections that the Ninth Circuit has denied Canada and its provincial organs in these cases – this Court should be especially reluctant to accept California's rationale of using the general rule restricting the appealability of remand orders as an excuse not to review the important FSIA questions presented here.

C. Subsequent State Court Proceedings Have Not Rendered This Case Moot

California offers a baseless assertion (Opp. 6-8) that the state trial court's dismissal of California's suit after remand has rendered this case moot. Dispositively, California concedes (Opp. 7 n.1) that it is appealing the state trial court's decision. Consequently, both parties retain "a continuing interest" in this litigation. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 192 (2000). If California were to prevail in its appeal, then all of the harms of protracted litigation in state court that gave rise to the FSIA would come to fruition. And, even without those immediate harms, Powerex faces substantial possible prejudice by having to litigate against the State in a state court proceeding where the allegations are that Powerex charged excessive prices for electricity to public utilities in the State and to the State itself (the California Department of Water Resources). California therefore overstates the situation in asserting that the case is now moot.

If Powerex is correct that the federal courts do have subject-matter jurisdiction over the lawsuits launched by the California parties against it, this Court's reversal of the Ninth Circuit will result in the return of this case to federal court. There is therefore no basis for California's argument against certiorari.

* * * * *

Although this case comes to this Court in a somewhat unusual posture, that does not diminish the importance of the questions for this Court's review. The Ninth Circuit could not have been clearer that it will never again revisit its erroneous holding in *NRG Energy* that Powerex is not a foreign sovereign, and *NRG Energy* has for all intents and purposes become moot through no fault of Powerex's. Powerex should not be denied this Court's review in such circumstances. This case and No. 05-1068 bring the FSIA status issue particularly to the fore, because the California parties specifically brought these suits in state court so that they could gain an advantage by asserting wrongful acts against a foreign entity in litigation brought by the State.[4] Yet avoiding such prejudicial effects was precisely why Congress afforded the procedural protections of the FSIA to foreign sovereigns even when they could not claim substantive immunity from suit.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. Alternatively, the petition in No. 05-85 should be granted and the Ninth Circuit's decision in that case vacated under *Munsingwear*.[5] If the Court issues a *Munsingwear* order

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[4] Even though this Court has called for responses to Powerex's petitions in Nos. 05-85 and 05-584, California recently waived response in No. 05-1068. On remand in the state trial court, Powerex recently filed a demurrer.

[5] A live controversy continues to exist in No. 05-85. The state trial court has not finally approved the Reliant settlement, and there are several objections to that settlement. The next state court hearing is scheduled for April 28, 2006. Although FERC initially approved the Reliant settlement, *see* Order on Settlement Agreement, *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 113 FERC ¶ 61,308 (Dec. 22, 2005), petitions for rehearing remain pending before FERC, which has issued an order extending the statutory period for consideration of those requests, *see* Order Granting Rehearing for Further Consideration, *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, Docket Nos. EL00-95-171 *et al.* (Feb. 22, 2006). Although the prospect of mootness might otherwise make No. 05-85 a less ideal

in that case, it should grant, vacate, and remand in this case with instructions to reconsider Powerex's foreign-sovereign status in light of the *amicus* briefs filed by Canada and British Columbia.

Respectfully submitted,

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vehicle for this Court's resolution of the issues, this case does not present such concerns. The appropriate course, therefore, would be either to vacate No. 05-85 for mootness and give Powerex an opportunity to obtain reconsideration by the Ninth Circuit in this case, or to grant this case and to hold No. 05-85 pending resolution of this case or until No. 05-85 becomes moot, whichever occurs first.

(5)

Nos. 05-85 and 05-584

In the Supreme Court of the United States

POWEREX CORP., PETITIONER

v.

RELIANT ENERGY SERVICES, INC., ET AL.

POWEREX CORP. DBA POWEREX ENERGY CORP., PETITIONER

v.

STATE OF CALIFORNIA, EX REL. BILL LOCKYER, ATTORNEY GENERAL OF CALIFORNIA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether petitioner, which is wholly owned by a crown corporation that is itself wholly owned by the Canadian Province of British Columbia, and which performs obligations and exercises rights of the Province pursuant to treaties with the United States, is entitled to the protections of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*, as an "organ of a foreign state or political subdivision thereof," 28 U.S.C. 1603(b)(2).

TABLE OF CONTENTS

Page

Statement 1
Discussion 6
I. The court of appeals misapplied an important provision of the FSIA, and its analysis conflicts with that of other circuits 6
II. The question presented is an important one, and No. 05-85 is an appropriate vehicle in which to resolve it 13
Conclusion 20

TABLE OF AUTHORITIES

Cases:

Amoco Petroleum Additives Co., In re, 964 F.2d 706 (7th Cir. 1992) 15
Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) 1
Carnegie-Mellon Univ. v. *Cohill*, 484 U.S. 343 (1988) ... 15
Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. *M/T Respect*, 89 F.3d 650 (1996) 12
Dole Food Co. v. *Patrickson*, 538 U.S. 468 (2003) 7
Filler v. *Hanvit Bank*, 378 F.3d 213 (2d Cir.), cert. denied, 543 U.S. 1022 (2004) 9
Freeport- McMoRan, Inc. v. *KN Energy, Inc.*, 498 U.S. 426 (1991), cert. denied, 502 U.S. 1122 (1992) ... 16
Grupo Dataflux v. *Atlas Global Group, L.P.*, 541 U.S. 567 (2004) 16
Kelly v. *Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841 (5th Cir.), cert. denied, 531 U.S. 979 (2000) 9, 12

Cases—Continued: Page

Kircher v. *Putnam Funds Trust*, 126 S. Ct. 2145 (2006) 15, 18, 20
Letherer v. *Alger Group, L.L.C.*, 328 F.3d 262 (6th Cir. 2003) 15
Liberty Mut. Ins. Co. v. *Wetzel*, 424 U.S. 740 (1976) 19
Linton v. *Airbus Industrie*, 30 F.3d 592 (5th Cir.), cert. denied, 513 U.S. 1044 (1994) 15
Nolan v. *Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990), cert. denied, 499 U.S. 962 (1991) 19
Patrickson v. *Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), aff'd, 538 U.S. 468 (2003) 5, 9
Poore v. *American-Amicable Life Ins. Co.*, 218 F.3d 1287 (11th Cir. 2000) 15, 16
Quackenbush v. *Allstate Ins. Co.*, 517 U.S. 706 (1996) .. 15
Shell Oil Co., In re, 966 F.2d 1130 (7th Cir. 1992) 17
St. Paul Mercury Indem. Co. v. *Red Cab Co.*, 303 U.S. 283 (1938) 16
Thermtron Products, Inc. v. *Hermansdorfer*, 423 U.S. 336 (1976) 14, 15
Things Remembered, Inc. v. *Petrarco*, 516 U.S. 124 (1995) 6, 14, 15, 19
Transit Cas. Co. v. *Certain Underwriters at Lloyd's*, 119 F.3d 619 (8th Cir. 1997), cert. denied, 522 U.S. 1075 (1998) 15
Trans Penn Wax Corp. v. *McCandless*, 50 F.3d 217 (3d Cir. 1995) 15
United States v. *Jorn*, 400 U.S. 470 (1971) 19
United States v. *Sisson*, 399 U.S. 267 (1970) 19

Cases—Continued: Page

USX Corp. v. *Adriatic Ins. Co.*, 345 F.3d 190 (3d Cir. 2003), cert. denied, 541 U.S. 903 (2004) 8, 9, 10, 11, 12, 13, 19

Willingham v. *Morgan*, 395 U.S. 402 (1969) 18

Van Meter v. *State Farm Fire & Cas. Co.*, 1 F.3d 445 (6th Cir. 1993) 17

Verlinden E.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) 1, 7

Treaties and statutes:

Treaty Between the United States of America and Canada Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, 15 U.S.T. 1555 2

Treaty between Canada and the United States of America Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D'Oreille River, Apr. 2, 1984, T.I.A.S. No. 11088, 1469 U.N.T.S. 309 2

Act of Oct. 1, 1996, Pub. L. No. 104-219, § 1, 110 Stat. 3022 16

Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. 2679(d) 14

Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.* 1

28 U.S.C. 1603(a) 1, 3, 7, 17

28 U.S.C. 1603(b) 1, 7, 17

28 U.S.C. 1603(b)(2) 5, 6, 7, 11

Statutes—Continued: Page

Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016(c)(1), 102 Stat. 4670 16
28 U.S.C. 1330(a) 7
28 U.S.C. 1441 17
28 U.S.C. 1442 17
28 U.S.C. 1441(d) 1, 3, 7, 18
28 U.S.C. 1442(a) 18
28 U.S.C. 1442(a)(1) 3, 18
28 U.S.C. 1447(c) 4, 14, 15
28 U.S.C. 1447(c) (1982) 16
28 U.S.C. 1447(d) 4, 14

Miscellaneous:

H.R. Rep. No. 889, 100th Cong., 2d Sess. Pt. 1 (1988) ... 17
H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976) .. 8, 10, 19
S. Rep. No. 366, 104th Cong., 2d Sess. (1996) 18

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, is "the sole basis for obtaining jurisdiction over a foreign state" in either state or federal court. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The FSIA defines the term "foreign state" to include "an agency or instrumentality of a foreign state," 28 U.S.C. 1603(a), which, in turn, is defined to mean:

> any entity—(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. 1603(b). The FSIA "guarantees foreign states the right to remove any civil action from a state court to a federal court." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 489 (1983) (citing 28 U.S.C. 1441(d)).

2. Petitioner is a corporation organized under the laws of the Province of British Columbia, a political subdivision of Canada. Petitioner is wholly owned by the British Columbia Power and Hydro Authority (BC Hydro), a provincial crown corporation that is in turn wholly owned by the Province of British Columbia. 05-85 Pet. App. 53a, 58a. As a crown corporation, BC Hydro is subject to the control and direction of

provincial officials, and BC Hydro pays its net revenue to the provincial government. *Id.* at 58a-59a.

Some of BC Hydro's responsibilities include implementing on behalf of Canada the Columbia River Treaty between the United States and Canada, which is designed to control the flow of the Columbia River for both flood control and power-generation purposes benefitting both nations. 05-85 Pet. App. 50a-51a.[1] Under the treaty-based management system, Canadian dams sometimes must release more water than would be optimal for their own power-generating purposes, in order to maintain water levels in the United States. *Id.* at 51a. In those circumstances, the treaty provides that the United States will reimburse BC Hydro (as assignee of Canada) for foregone power-generating opportunities. See *id.* at 51a, 55a.

BC Hydro generates more electric power than the Province needs. In 1988 BC Hydro created petitioner as a wholly owned subsidiary to market BC Hydro's excess power capacity to the United States, including the power to which Canada is entitled under the Columbia River Treaty. See 05-85 Pet. App. 53a, 55a. In addition, petitioner is responsible for providing power to the City of Seattle as required in the Skagit River Treaty between the United States and Canada.[2] See *id.* at 56a-57a. Petitioner's income is consolidated with that of BC Hydro and transferred either to the Province itself or to a special rate-stabilization account according to a formula specified by the Province. See *id.* at 202a-204a.

3. a. In No. 05-85, respondent plaintiffs—including the State of California and individual energy consumers—sued

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[1] See Treaty Between the United States of America and Canada Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, 15 U.S.T. 1555; 05-85 Pet. App. 61a-137a.

[2] See Treaty Between Canada and the United States of America Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D'Oreille River, Apr. 2, 1984, T.I.A.S. No. 11088; 05-85 Pet. App. 138a-146a.

respondent cross-plaintiffs (among others) in California state court, seeking damages for alleged manipulation of the electricity market in violation of state law. The respondent cross-plaintiffs filed cross-complaints against several entities including petitioner, BC Hydro, and two federal government agencies, the Bonneville Power Administration (BPA) and the Western Area Power Administration (WAPA). The cross-complaints seek indemnification and allege that petitioner and the other cross-defendants participated in or contributed to the manipulation of energy markets.

Petitioner and BC Hydro filed notices removing the case to federal district court pursuant to the FSIA, 28 U.S.C. 1441(d). The federal agencies invoked 28 U.S.C. 1442(a)(1) as additional authority for removal. 05-85 Pet. App. 19a. The respondent plaintiffs moved to remand the case to state court. They argued that the court lacked jurisdiction to adjudicate the claims against BC Hydro and the federal agencies because they were immune from suit on the cross-claims, and that petitioner was not entitled to the protections of the FSIA because it was not an agency or instrumentality of British Columbia. See *id.* at 20a, 22a, 33a, 38a.

The district court granted the motion to remand. The court held that, as "a corporation wholly-owned by a political subdivision of a foreign government," BC Hydro qualified as a "foreign state" for purposes of the FSIA, 05-85 Pet. App. 21a (citing 28 U.S.C. 1603(a)), and that the claims against it did not fall within any of the FSIA's exceptions to immunity, see *id.* at 21a-33a. The court also held that BPA and WAPA were immune from suit, *id.* at 40a, and that because the state court had lacked jurisdiction over the claims against BPA and WAPA, by derivation, so did the federal court, *id.* at 43a-44a.

The district court concluded that petitioner did not come within the statutory definition of an agency or instrumentality, and therefore did not qualify as a "foreign state" under

the FSIA. 05-85 Pet. App. 33a-38a. The district court held that petitioner is not an "organ" of British Columbia because petitioner does not exercise regulatory authority, is not immune from suit under Canadian law, and is not subject to active oversight by the provincial government. *Id.* at 35a. The court also observed that the provincial government does not appoint petitioner's corporate officers, and petitioner's employees are not treated as civil servants. *Ibid.* Nor, the court held, is petitioner an agency or instrumentality under the "ownership" test, because the Province does not directly own a majority of petitioner's shares. *Id.* at 36a-38a.

The district court remanded the action to state court. 05-85 Pet. App. 44a. B.C. Hydro and the federal agency cross-defendants sought to clarify that the claims against them had been dismissed on immunity grounds, but the district court denied their requests. The court reasoned that, because it could not exercise jurisdiction over the claims against the immune defendants, it could not dismiss those claims, and was instead required by 28 U.S.C. 1447(c) to remand the entire action (including the claims as to which there was immunity) to state court. See C.A. E.R. (PWX) 900, 904.

b. Petitioner, respondent cross-plaintiffs, BPA and WAPA each appealed. 05-85 Pet. App. 8a-9a. Respondent cross-plaintiffs challenged the holding that BC Hydro, BPA and WAPA were immune from suit; BPA and WAPA appealed the district court's failure to dismiss the claims against them before remanding; and petitioner challenged the denial of its status as an agency or instrumentality of the Province. *Ibid.*

The court of appeals' opinion first held that 28 U.S.C. 1447(d) did not preclude appellate review of the district court's order. The court reasoned that the district court had removal jurisdiction over the case at the outset because of BC Hydro's status as a foreign state and BPA and WAPA's status as federal agencies. 05-85 Pet. App. 10a. Because the district

court had jurisdiction, and had exercised that jurisdiction to decide the claims of immunity and the status of petitioner, the court of appeals held that it was "not deprived by § 1447(d) of jurisdiction to review these substantive rulings." *Ibid.*

The court then held (on the appeal of the respondent cross-plaintiffs) that BC Hydro, BPA, and WAPA were entitled to immunity. 05-85 Pet. App. 11a, 14a. It also held (on the appeal of the federal agencies) that the district court erred in refusing to dismiss the claims against the federal agencies because, in a removed action, a defendant's immunity "is vindicated only by the district court's dismissal of the claims." *Id.* at 16a.

With respect to petitioner's appeal, the court of appeals affirmed the district court's conclusion that petitioner does not qualify as an "organ of a foreign state or political subdivision thereof," 28 U.S.C. 1603(b)(2). 05-85 Pet. App. 14a. The court stated that its determination of organ status would turn ultimately on "whether the entity engages in a public activity on behalf of the foreign government," and that it would "look to the purposes of an entity's activities, the entity's independence from government, the level of financial support received from the government, and the entity's privileges and obligations under the law." *Id.* at 15a (quoting *Patrickson* v. *Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001), aff'd on other grounds, 538 U.S. 468 (2003)). The court of appeals stated that petitioner, like the entities in *Patrickson*, "was not run by government appointees, was not staffed with civil servants, was not wholly owned by the government, was not immune from suit, and did not exercise any regulatory authority." *Id.* at 15a-16a. The court acknowledged that petitioner offered evidence that it "serves a public purpose," but concluded that petitioner's "high degree of independence from the government of British Columbia, combined with its lack of financial support from the government and its lack of special privileges

or obligations under Canadian law dictate [the] holding that PowerEx is not an organ of British Columbia." *Id.* at 16a.

4. In No. 05-584, respondent (the California Attorney General) sued petitioner in state court, alleging that petitioner had manipulated the energy market in violation of state law. 05-584 Pet. App. 4a-5a. Petitioner removed the case to federal district court, on the grounds that it is a foreign state under the FSIA and that respondents' claims necessarily raised federal questions. *Id.* at 5a. The district court remanded. *Id.* at 4a-15a. With respect to petitioner's FSIA argument, the district court relied on the Ninth Circuit's earlier decision at issue in No. 05-85. *Id.* at 14a.

Petitioner appealed to the Ninth Circuit, which sua sponte dismissed the appeal for lack of jurisdiction, citing 28 U.S.C. 1447(d), and this Court's decision in *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 128 (1995). 05-584 Pet. App. 1a.

DISCUSSION

The court of appeals' application of the FSIA's "organ of a foreign state" provision, 28 U.S.C. 1603(b)(2), is erroneous and conflicts with decisions of other courts of appeals. Moreover, the issue is an important, recurring, and sensitive one that warrants this Court's consideration. Although respondents assert several purported obstacles to the Court's reaching that issue, we believe that the petition in No. 05-85 presents an appropriate vehicle for this Court's review. Accordingly, the United States suggests that the Court grant review on the first question presented in No. 05-85, and hold the petition in No. 05-584 pending resolution of No. 05-85.

I. THE COURT OF APPEALS MISAPPLIED AN IMPORTANT PROVISION OF THE FSIA, AND ITS ANALYSIS CONFLICTS WITH THAT OF OTHER CIRCUITS

A. The FSIA establishes a "comprehensive scheme" governing the extent to which "foreign sovereigns may be held

liable in a court in the United States." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 496-497 (1983). In recognition of the fact that many states engage in commercial activities not unlike those of private actors, the FSIA codifies the "restrictive theory" of foreign sovereign immunity, according to which foreign states may be sued for their "commercial activities." *Id.* at 487-488. Although the FSIA denies immunity to foreign states in those circumstances, "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, the Act guarantees foreign states" certain procedural protections, such as the right to remove a civil action from state to federal court. *Id.* at 489. The FSIA also guarantees a foreign state the right to a bench, rather than jury, trial in federal court on claims as to which they are not immune, see 28 U.S.C. 1330(a), 1441(d).

Congress recognized that there are any number of ways in which foreign governments may organize their operations and functions, and it made certain that the FSIA would be flexible enough to accommodate that variety. Thus, Congress extended the protections of the FSIA to an "agency or instrumentality" of a foreign state, 28 U.S.C. 1603(a), and provided that entities could qualify as an "agency or instrumentality" in several ways, 28 U.S.C. 1603(b). The statutory definition establishes a categorical rule with respect to an entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. 1603(b)(2). See *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 474 (2003) (construing that categorical protection to require direct ownership by the foreign state or political subdivision). In contrast to that categorical rule, the other prong of the definition—"an organ of a foreign state or political subdivision"—is intended to have a more functional application that is not dependent on a particular form of organization. See

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 15-16 (1976) (recognizing that an agency or instrumentality "could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name").

This Court has never addressed the meaning or application of this prong of FSIA's definition of an agency or instrumentality, yet that provision has taken on additional importance since the Court's decision in *Dole Food*. Whereas before the *Dole Food* decision, entities such as petitioner were often afforded protection under the FSIA's majority-ownership test, those entities must now rely exclusively on the immunity for organs of foreign states. See, *e.g.*, *USX Corp.* v. *Adriatic Ins. Co.*, 345 F.3d 190, 199 (3d Cir. 2003) (noting that the district court had initially upheld the defendant's foreign state status under the majority-ownership test, but, after *Dole Food*, had reevaluated the question under the "organ of a foreign state" prong), cert. denied, 541 U.S. 903 (2004); *id.* at 208 ("A flexible approach is particularly appropriate after *Dole*, inasmuch as courts likely now will be asked to evaluate the possible organ status of a wide variety of entities controlled by foreign states through tiering arrangements and because of the widely differing forms of ownership or control foreign states may exert over entities.").

B. At first glance, the courts of appeals may appear to have adopted similar approaches to determining whether an entity qualifies as an organ of a foreign state. Each considers multiple factors including, *inter alia*, the circumstance of the entity's creation, its purpose, the involvement of the state in its affairs, its employment practices, any financial support or grant of exclusive economic rights from the state, and its privileges and obligations under local law. See 05-85 Pet. App.

15a; *Filler* v. *Hanvitt Bank*, 378 F.3d 213, 217 (2d Cir.), cert. denied, 543 U.S. 1022 (2004); *USX*, 345 F.3d at 209; *Patrickson*, 251 F.3d at 807;[3] *Kelly* v. *Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-847 (5th Cir.), cert. denied, 531 U.S. 979 (2000).

A closer study, however, reveals a critical divergence in the manner in which the various circuits apply their seemingly similar tests. The Third and Fifth Circuits, for example, have emphasized "the need for a * * * flexible approach under the organ prong of section 1603(b)(2)," *USX*, 345 F.3d at 208, and that a court should "*not* apply [the factors] mechanically or require that all five support an organ-determination," *Kelly*, 213 F.3d at 847. Moreover, those courts understand the need to apply the factors with constant reference to the ultimate question: whether the defendant is "an entity that engages in activity serving a national interest and does so on behalf of its national government." *USX*, 345 F.3d at 209. The relevance and weight of any particular factor in a given case depends on the extent to which it informs that ultimate test. See *id.* at 214 ("[w]eighing the[] factors qualitiatively as well as quantitatively").

Although the Ninth Circuit also makes reference to "the ultimate question," 05-85 Pet. App. 15a, in practice it proceeds mechanically through a checklist. Its analysis, in full, of the factors as they apply to petitioner in No. 05-85 was as follows:

> [Petitioner] was not run by government appointees, was not staffed with civil servants, was not wholly owned by the government, was not immune from suit, and did not exercise any regulatory authority. *Even though [petitioner]*

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[3] In *Patrickson*, the Ninth Circuit held that the foreign entity there was neither an organ of nor majority-owned by a foreign state or political subdivision. This Court granted a petition for a writ of certiorari to consider only the question of majority ownership.

> *offers some evidence that it serves a public purpose*, its high degree of independence from the government of British Columbia, combined with its lack of financial support from the government and its lack of special privileges or obligations under Canadian law dictate our holding that [petitioner] is not an organ of British Columbia.

Id. at 15a-16a (emphasis added) (citation omitted). In other words, the court of appeals disregarded the substantial evidence that petitioner "serves a public purpose" because it did not conform with the result indicated by the court's mechanical application of other specified factors. The court did not analyze those factors to see what light they shed on whether petitioner was serving the interests of the Province.

The crucial differences between the courts of appeals' approaches can best be appreciated by comparing the analysis of the Ninth Circuit in No. 05-85 with that of the Third Circuit in *USX*. For example, the Ninth Circuit found it significant that petitioner "was not immune from suit" under Canadian law. 05-85 Pet. App. 16a. In contrast, the Third Circuit determined that whether the defendant "is subject to suit" in its home country "should not be considered [as] part of the organ analysis." *USX*, 345 F.3d at 214. It noted that, in order to be an organ, "an entity *must* be a separate legal person" and that "the right to sue and be sued [is] one factor to consider" in that analysis. *Id.* at 214 & n.24; *id.* at 209 n.17 (citing H.R. Rep. No. 1487, *supra*, at 15).[4] Similarly, whereas the Ninth Circuit counted the fact that petitioner engaged in commercial, rather than regulatory, activities against it, 05-85 Pet.

[4] The Ninth Circuit's focus on petitioner's lack of immunity in Canada as a basis to deny petitioner all of the protections of the FSIA is particularly inappropriate when the entity engages in commercial activities that Congress likewise determined should not be protected by foreign sovereign immunity in the United States (even though an organ of a foreign state engaging in such activities would still enjoy the other protections of the FSIA).

App. 16a, the Third Circuit cautioned that "too heavy a focus on the commercial nature of an entity's activities would tend to confuse the question of the level of protection provided by the FSIA (full immunity or not) with the antecedent question * * * whether the entity comes within the purview of the FSIA at all," *USX*, 345 F.3d at 210.

The Ninth Circuit also determined as a factor against petitioner that it was "not wholly owned by the government," 05-85 Pet. App. 15a-16a, by which it meant that petitioner "is not owned by the Province, but by BC Hydro," *id.* at 16a. But that improperly weights the inquiry against treating an entity as an organ of a foreign state. That inquiry will generally be salient only for entities that do not satisfy the majority-ownership test. Such entities should not start the inquiry whether they satisfy Section 1603(b)(2)'s alternative standard with one strike against them. In contrast, the Third Circuit found that when a foreign government "has complete control over all shares of [the defendant] albeit through a tiered arrangement," by which the subsidiary serves the government's purposes, "this factor weighs in favor of a finding of organ status." *USX*, 345 F.3d at 213.

Similarly, whereas the Ninth Circuit emphasized that petitioner is "not staffed with civil servants," 05-85 Pet. App. 15a, the Third Circuit held that fact to be "of little relevance," and emphasized instead the fact that a government minister approved the entity's administrator, *USX*, 345 F.3d at 212-213. And, in contrast to the Ninth Circuit, which held that the Province's assignment to petitioner of the Province's entitlement to hydro-electric power under the Columbia River Treaty did not qualify as "financial support from the government," 05-85 Pet. App. 16a, the Third Circuit observed that the exploitation and distribution of natural resources is a "government purpose" that "would weigh * * * heavily in favor of organ status," *USX*, 345 F.3d at 210 (citing *Kelly*, 213 F.3d at 848, and

Corporacion Mexicana de Servicios Meritimos, S.A. de C.V. v. *M/T Respect*, 89 F.3d 650, 654-655 (9th Cir. 1996)).

C. A proper analysis of the question demonstrates that petitioner is an organ of the Province.[5] Under the proper approach, the court of appeals should have focused on the fact that petitioner was created for the purpose of marketing for export the Province's excess resource—electric power—including, in particular, marketing Canada's entitlement to power generated by BPA pursuant to the Columbia River Treaty and providing power to the City of Seattle as required of the Province in the Skagit River Treaty. See 05-85 Pet. App. 55a, 56a-57a. Rather than emphasizing that the Province does not provide direct financing to petitioner, it should have focused on the fact that petitioner plays an important role in discharging Canada's treaty obligations, that the Province assigned to petitioner its rights to Canada's entitlement under the Columbia River treaty, "a very significant resource," *id.* at 55a, and that petitioner's net income is returned to the Province via BC Hydro's consolidated income statements, see *id.* at 202a-204a. Instead of counting against petitioner the fact that its employees are not civil servants, the court should have emphasized that members of petitioner's board of directors are appointed by BC Hydro's board, which is appointed by the Provincial Lieutenant Governor, and that outside members of petitioner's board "were subject to concurrence by the Office of the Premier," *id.* at 58a-59a. Rather than declaring that petitioner is "not wholly owned by the government," *id.* at 15a-16a, it should have attached significance to the fact that the Province owns 100% of BC Hydro, which in turn owns 100% of petitioner. On a proper analysis, the court of appeals

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[5] The United States believes the courts below erred in failing to recognize petitioner's status as an organ of British Columbia that is entitled to the procedural protections of the FSIA, but takes no position on the merits of the claims at issue in these cases.

should have concluded that petitioner is an organ of the Province of British Columbia.[6]

II. THE QUESTION PRESENTED IS AN IMPORTANT ONE, AND NO. 05-85 IS AN APPROPRIATE VEHICLE IN WHICH TO RESOLVE IT

A. As noted above, a proper understanding of the "organ" prong is of considerable significance under the FSIA in light of *Dole Food*'s clarification of the majority-ownership test for agency or instrumentality status. See *USX*, 345 F.3d at 208 (quoted at p. 8, *supra*). A proper application of that prong is particularly important in this case. Canada is our Nation's largest trading partner, and Canada and its Provinces have numerous crown corporations that engage in trade with the United States. See 05-85 Pet. 24-25. Petitioner was created by BC Hydro—the Province's statutory agent for the promotion of hydroelectric development—specifically to market BC Hydro's surplus electric power outside the Province, including power the Province is entitled to receive or obligated to provide under treaties between the United States and Canada. Petitioner marketed power valued at approximately $11 billion Canadian between 2000 and 2004, see *ibid.*, and a large part of that power goes to States in the Ninth Circuit. Thus, if the court of appeals' decision is not overturned, it will bind petitioner in virtually all suits brought against it.

B. The respondent plaintiffs in No. 05-85 do not attempt to defend the merits of the court of appeals' classification of

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[6] As noted in the text, the fact that petitioner is 100% owned by a crown corporation that is, in turn, the statutory agent of and wholly owned by the Province is highly significant to petitioner's status as an organ of the Province. Petitioner also urges that the fact that BC Hydro owns Powerex as the Province's agent warrants a finding that petitioner satisfies the "ownership" prong, based on a case-by-case analysis. See 05-85 Pet. i, 29. The Court need not grant review on that question because petitioner qualifies as an "organ" under a correct application of the FSIA.

petitioner. Rather, they urge that the court of appeals' approach to the issue is not "new or different," 05-85 Br. in Opp. 6, and that, in any event, the Court cannot decide the issue because 28 U.S.C. 1447(d) precludes appellate review of the district court's remand order, 05-85 Opp. 4, and because plaintiffs' claims have been settled and dismissed, *id.* at 6. The first argument is incorrect, as we have demonstrated, see pp. 6-13, *supra*, and the other objections are not well founded.

1. In No. 05-85, the court of appeals held that it had "jurisdiction to review the district court's ruling on substantive issues of controlling law on the merits of the case." Pet. App. 6a. That conclusion was correct. The district court plainly had subject-matter jurisdiction at the time of removal, and its subsequent rulings did not divest it of that jurisdiction. Appellate review of the district court's remand order is therefore not barred by 28 U.S.C. 1447(d).[7]

This Court has made clear that Section 1447(d) must be read in *pari materia* with 28 U.S.C. 1447(c). See *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 343 (1976). "[O]nly remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." *Things Remembered,*

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[7] A similar issue relating to appeal from the denial of immunity under the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. 2679(d), is presented in *Osborn* v. *Haley*, No. 05-593 (argued October 30, 2006). Although the Court could hold this case pending resolution of *Osborn*, the better course would be to grant the petition in 05-85 outright and without waiting for a final decision in *Osborn*. If appellate jurisdiction is upheld in *Osborn*, that will only underscore that jurisdiction is appropriate here. On the other hand, if the Court finds appellate jurisdiction to be lacking in *Osborn*, it will be important to clarify that a similar result does not apply in the FSIA context, when the effect of such a rule would be to defeat Congress's judgment that questions regarding entitlement to the protections of the FSIA be decided in federal court if a foreign government entity elects a federal forum—at least where, as here, an entity that both courts below found *is* a foreign state (BC Hydro) also remains as a party to the case on remand.

Inc. v. *Petrarca*, 516 U.S. 124, 127 (1995). See *Kircher* v. *Putnam Funds Trust*, 126 S. Ct. 2145, 2153 (2006) (same). Thus, this Court has reviewed a remand order based on a district court's crowded docket, *Thermtron*, 423 U.S. at 340-341, a remand based on abstention, *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 710-712 (1996), and the discretionary remand of state law claims after the federal law claims that had supported removal were eliminated from the case, *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 348 (1988). Each of those cases was properly removed to federal district court, the district court therefore was properly vested with jurisdiction from the outset, and the purported ground for the remand was not one authorized by Section 1447(c).[8]

One ground for remand provided in Section 1447(c) is lack of subject matter jurisdiction. But that reference must be understood, and has been understood by the majority of the courts of appeals, as limited to remand orders for a lack of subject matter jurisdiction at the time of removal.[9] That

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[8] *Cohill* held that "Section[] * * * 1447(c) * * * do[es] not apply to cases over which a federal court has pendent jurisdiction," and that therefore "the remand authority conferred by the removal statute [Section 1447(c)] and the remand authority conferred by the doctrine of pendent jurisdiction overlap not at all." 484 U.S. at 355 n.11. It follows from *Cohill*'s holding that a discretionary remand of pendent claims is not a remand under Section 1447(c) and such a remand is not within Section 1447(d)'s bar to appellate review. See *Kircher*, 126 S. Ct. at 2153. But see *Things Remembered*, 516 U.S. at 130 (Kennedy, J., concurring) (stating that *Cohill* did not decide "whether subsection (d) would bar review" of orders remanding pendent claims as a matter of discretion).

[9] See, *e.g.*, *Lether*er v. *Alger Group, L.L.C.*, 328 F.3d 262, 265 (6th Cir. 2003) ("appellate review of remand orders is prohibited only where the district court remands because it lacks subject matter jurisdiction at the time of removal"); *Poore* v. *American-Amicable Life Ins. Co.*, 218 F.3d 1287, 1290-1291 (11th Cir. 2000); *Transit Cas. Co.* v. *Certain Underwriters at Lloyd's*, 119 F.3d 619, 623 (8th Cir. 1997), cert. denied, 522 U.S. 1075 (1998); *Trans Penn Wax Corp.* v. *McCandless*, 50 F.3d 217, 223 (3d Cir. 1995); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708-709 (7th Cir. 1992). But see *Linton* v. *Airbus Industrie*,

reading is consistent with the general rule that a federal court's subject matter jurisdiction is fixed at the time the suit is brought and is not defeated by subsequent acts. See, *e.g.*, *Grupo Dataflux* v. *Atlas Global Group, L.P.*, 541 U.S. 567, 574 (2004); *Freeport-McMoRan, Inc.* v. *KN Energy, Inc.*, 498 U.S. 426 (1991), cert. denied, 502 U.S. 1122 (1992); *St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283, 294 (1938).

That reading is also consistent with the history of the removal statutes. Before 1988, the text of Section 1447(c) made explicit that it authorized remand based only on defects at the time of removal. It allowed remand "[i]f at any time before final judgment it appears that the case was removed improvidently and without jurisdiction." 28 U.S.C. 1447(c) (1982). In 1988, Congress amended Section 1447(c) to distinguish between two types of defects in removal jurisdiction—a defect in removal procedure, and a defect in the district court's subject matter jurisdiction—and to provide that procedural defects are waived if not raised promptly. The amended provision specified that "a motion to remand the case on the basis of any defect in removal procedure must be made within 30 days" of removal, while it continued to require remand "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction." Pub. L. No. 100-702, § 1016(c)(1), 102 Stat. 4670. In 1996, the provision was again amended to clarify that waivable objections to removal include "any defect other than lack of subject matter jurisdiction." Pub. L. No. 104-219, § 1, 110 Stat. 3022.

As a number of courts of appeals have concluded, after reviewing the change in statutory text and the legislative history, "the proper inquiry is still whether the court had jurisdiction at the time of removal." *Poore*, 218 F.3d at 1290. See

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30 F.3d 592, 599-600 (5th Cir.) ("jurisdictional remands premised on post-removal events are not reviewable"), cert. denied, 513 U.S. 1044 (1994).

Van Meter v. *State Farm Fire & Cas. Co.*, 1 F.3d 445, 450 n.2 (6th Cir. 1993); *In re Shell Oil Co.*, 966 F.2d 1130, 1133 (7th Cir. 1992). Congress did not intend to depart from the well established rule "that jurisdiction present at the time a suit is filed or removed is unaffected by subsequent acts." *Id.* at 1133. Rather, Congress's focus in adopting the textual change was on ensuring that plaintiffs raise promptly any objection to removal on purely procedural grounds. See H.R. Rep. No. 889, 100th Cong., 2d Sess. Pt. 1, at 72 (1988). The statute's current structure bears that out. The reference in the first sentence of Section 1447(c) to "any defect other than lack of subject matter jurisdiction" makes clear that by the phrase "lack of subject matter jurisdiction" Congress means a particular, non-waivable, "defect" in removal.[10]

In this case, the district court stressed that no party contested that the actions could be removed pursuant to 28 U.S.C. 1441 and 1442. See 05-85 Pet. App. 20a. That recognition of the propriety of the court's removal jurisdiction at the outset is entirely correct and is, in itself, sufficient to take this case outside the scope of Section 1447(d). The district court itself recognized (and the court of appeals affirmed) that, as a crown corporation wholly owned by the Province of British Columbia, BC Hydro qualifies as an agency or instrumentality of Canada and therefore as a foreign state under 28 U.S.C. 1603(a) and (b). 05-85 Pet. App. 12a-14a, 21a. Therefore BC

[10] The legislative history of the 1988 change also reflects that Congress understood the mandatory (and unreviewable) remand for lack of subject matter jurisdiction at the time of removal that is referred to in Section 1447(c) to be distinct from a discretionary remand after the court had exercised its removal jurisdiction to resolve disputed federal questions. See H.R. Rep. No. 889, *supra*, at 72 (emphasizing that "[t]he amendment is written in terms of a defect in 'removal procedure' in order to avoid any implication that remand is unavailable after disposition of all federal questions leaves only State law questions that might be decided as a matter of ancillary or pendent jurisdiction or that instead might be remanded").

Hydro had the right to remove the action under 28 U.S.C. 1441(d) in order to have its claim of immunity decided by a federal, rather than state, forum. See *ibid.* ("Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court."). The district court did, in fact, exercise its removal jurisdiction to adjudicate BC Hydro's claim of immunity, which the court upheld. 05-85 Pet. App. 21a-33a. As federal agencies, BPA and WAPA were likewise entitled to remove the action pursuant to 28 U.S.C. 1442(a)(1) and have their immunity from suit adjudicated by the federal district court, which they did. See 05-85 Pet. App. 7a, 39a-40a; see *Kircher*, 126 S. Ct. at 2155 n.12 (noting that under Section 1442(a), the federal defendant need only raise a "colorable" defense of federal immunity in order to remove, because that section "reflects a congressional policy that 'federal officers, indeed the Federal Government itself, require the protection of a federal forum'") (quoting *Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969)).[11]

Because (as the district court recognized, 05-85 Pet. App. 20a) removal by BC Hydro, BPA, and WAPA was proper, the

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[11] The logic of respondent plaintiffs' argument against appellate jurisdiction would appear to be that the court of appeals did not even have jurisdiction over the appeals by BPA and WAPA from the district court's refusal to dismiss them from the case rather than remanding the case back to state court with those federal agencies as parties, even though no party contested in district court that the cases were properly removed based on the presence of those agencies as defendants, see 05-85 Pet. App. 20a, and the district court correctly determined that both agencies were immune from suit. That result would deprive federal agencies of an important protection afforded by the removal statute (and sovereign immunity): the ability to remove the case from state court for the very purpose of securing dismissal from the case on immunity grounds at the outset. See S. Rep. No. 366, 104th Cong., 2d Sess. 30-31 (1996) (Section 1442(a)(1) reflects "Congress' intent that questions concerning * * * the scope of Federal immunity * * * be adjudicated in Federal court").

district court had subject-matter jurisdiction over the entire case irrespective of the sovereign status of petitioner. See, *e.g.*, *USX*, 345 F.3d 190; *Nolan* v. *Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990), cert. denied, 499 U.S. 962 (1991); see also H.R. Rep. No. 1487, *supra* at 32. The bar to appellate review in Section 1447(d) therefore does not apply to any remand order entered by the district court after it had resolved the immunity questions properly brought before it.[12]

Because the court of appeals correctly concluded that it had appellate jurisdiction over the appeal in No. 05-85, the Court should grant review in that case limited to the question of petitioner's status as an organ of a foreign state. In contrast, in No. 05-584, the court of appeals concluded that it lacked jurisdiction. 05-584 Pet. App. 1a. Although the court of appeals cited Section 1447(d) as the basis for dismissing the appeal, there is some dispute as to whether that holding was, in fact, based on the panel's understanding that the prior panel decision in No. 05-85 compelled the conclusion that the case had not been properly removed. See 05-584 Reply 3-4. Because the court of appeals' one page order does not lend itself to a full consideration of the issue by this Court, we sug-

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[12] Although the district court invoked Section 1447(c) as the basis for its remand, that court's characterization of its action is not binding on this Court as to the scope of its appellate jurisdiction. See, *e.g.*, *United States* v. *Jorn*, 400 U.S. 470, 478 n.7 (1971) (plurality opinion of Harlan, J.) ("the trial judge's characterization of his own action cannot control the classification of the action for purposes of our appellate jurisdiction"); *United States* v. *Sisson*, 399 U.S. 267, 279 n.7 (1970). The reviewing court must determine its own jurisdiction independently. See *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 740, 742 (1976) (court of appeals erred in accepting the district court's "recital" that final judgment had been entered when the record showed the contrary); *Things Remembered*, 516 U.S. at 134 (Ginsburg, J., concurring).

gest that the Court hold the petition in No. 05-584 and dispose of it consistent with the disposition of No. 05-85.[13]

Finally, the settlement agreement reached between the plaintiff and respondent cross-plaintiffs in No. 05-85 does not moot the petition. Although the respondent cross-plaintiffs have apparently offered to dismiss the cross-claims, any such dismissal would be without prejudice to reinstating them if the underlying settlement with the plaintiffs is overturned. See 05-85 Reply 2-3. Petitioner has not agreed to settle on those terms. *Ibid.* Moreover, it is our understanding that certain parties object to the settlement and have recently filed appeals concerning their objections in the state courts. See Wholesale Electricity Antitrust Cases I & II, J.C.C.P. No. 4204 (Cal. Super. Ct. San Diego County), State of Montana's Notice of Appeal (July 28, 2006). Thus, the petition is not now moot, and this Court would almost certainly resolve the case before the settlement between the plaintiff and respondent cross-plaintiffs becomes final.

CONCLUSION

The petition for a writ of certiorari in No. 05-85 should be granted limited to the first question presented. The petition for a writ of certiorari in No. 05-584 should be held pending resolution of No. 05-85 and then disposed of as appropriate in light of the disposition of that case.

Respectfully submitted.

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[13] A typical remand order merely determines which of two acceptable fora will adjudicate the plaintiff's claim, and Congress has determined that interests of efficiency warrant barring appellate review of that decision. See *Kircher*, 126 S. Ct. at 2156. In contrast, Congress has specifically determined that proper treatment of foreign states and their agencies and instrumentalities demands that they be afforded a federal forum, in which they would be subject to trial only by a judge. Congress should not lightly be taken to have intended for those benefits to be irretrievably lost by a district court's erroneous ruling.

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